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THE CONSTITUTION AND SOCIAL PROGRESS

A SERIES OF ADDRESSES AND PAPERS PRESENTED AT THE ANNUAL
MEETING OF THE ACADEMY OF POLITICAL SCIENCE
NOVEMBER 14, 1935

EDITED BY
PARKER THOMAS MOON

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VOLUME 10

CONSTITUTIONAL AND SOCIAL PROGRESS

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PREFACE

THE restrictions which the Constitution of the United States imposes upon governmental action for economic welfare and social progress, the reasons that may be given for maintaining these constitutional limitations unaltered, and the arguments in favor of amending the Constitution to permit more effective social legislation are subjected to searching analysis in this volume of papers and addresses delivered at the Annual meeting (Fifty-fifth Year) of the Academy of Political Science. The meeting was held on November 14, 1935 at the Hotel Astor in New York City. Rarely has the Academy been so fortunate in the choice of a topic or in the list of eminent public men and distinguished scholars who consented to participate in the discussion. On so important and so controversial a subject views must necessarily differ. The Academy assumes no responsibility for the opinions expressed in these pages. The purpose of the Committee on Program and Arrangements has been to select qualified expositors of various opinions, rather than to present harmonious pleadings for any party or policy.

The officers of the Academy wish to express their sincere gratitude to the speakers and to the Committee on Program and Arrangements. The members of the committee were: William L. Ransom, (Chairman), Miss Ethel Warner (Director), W. Randolph Burgess, Nicholas Murray Butler, Joseph P. Chamberlain, Charles E. Clark, John Dickinson, Noel T. Dowling, Jerome N. Frank, Leon Fraser, Raymond V. Ingersoll, Thomas W. Lamont, Walter Lippmann, Howard Lee McBain, Roswell C. McCrea, Ogden L. Mills, Wesley C. Mitchell (President), Parker T. Moon, Shepard Morgan, Robert C. Morris, Thomas I. Parkinson, Owen D. Young.

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PART I

THE SUPREME COURT AND THE STATES

INTRODUCTION *

HON. WILLIAM L. RANSOM, *Presiding*

Trustee of the Academy of Political Science

Chairman, Committee on Program and Arrangements

I am glad to preside at this session, because I am sure that, through this meeting, the Academy of Political Science is making an impartial and important contribution to the enlightened discussion of questions which are uppermost in the public mind at this time. That has been the traditional function of the Academy for the fifty-five years since its founding.

The Academy selects the most vital topics in the social, legal and economic fields, from time to time. It brings to its platform men and women who have reasoned views and the ability to state them clearly and fairly. The Academy has done this, in its program for this meeting. The Academy does not sponsor or advocate particular views. Its programs present a variety of views, often conflicting. But it offers competent authorities and informed views which ought to be considered and taken into account, in the formation of an intelligent public opinion. I doubt if, during the twenty-two years I have been a Trustee of the Academy, it has ever selected a more important topic or one on which an open-minded discussion is more genuinely needed.

The issues of constitutional change are before the American people. We can afford to look at these issues on their merits, apart from the heat and vigor of partisan or political strife. There is no place for unreason or closed minds or challenge of motives, on either side, at the opening of this great debate. The Academy of Political Science is happy to make today its contribution to an informed public discussion.

* Opening the First Session of the Fifty-fifth Annual Meeting.

The subject of the part of the program which is presented this forenoon is "The Supreme Court and the States". It is traditional, in the development of our Academy programs, that the first speaker shall be one who is qualified to present what may be called a general view of the subject, and to lay the foundation, perhaps, for the more specific discussions which follow under other topics. Very appropriately we have as the first speaker this morning a distinguished Professor of Government in Harvard University. His topic will be "The National Powers Under the Constitution". Dr. Elliott is a man whose writings and whose public utterances on this question have widely been received, with much interest. I have the honor to present as your first speaker, Dr. William Yandell Elliott.

(Applause)

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THE NATIONAL POWERS UNDER THE CONSTITUTION

W. Y. ELLIOTT

Professor of Government, Harvard University

THERE must be some deeply rooted urge in Western culture, perhaps in all human culture, that makes for consulting oracles. How otherwise are we to explain the peculiar power possessed by the Supreme Court of the United States? For over a year now the nation has been waiting from month to month to learn what judicial omniscience would allow to stand in the building of the New Deal. The revaluation of the dollar seems to have been allowed, with only a moral scolding as punishment. A judicial quietus has been put on the first Frazier-Lemke Farm Mortgage Act and on railway pensions, and on the whole N. R. A. Curiously enough only the labor clauses of many codes seem to have disappeared. Price-fixing (voluntary) goes on. Today with the A. A. A. under test, the Wagner Labor Disputes Act, the Guffey Coal Act and the Wheeler-Rayburn Act offering targets for judicial philippics, and the heretofore-unchallenged spending power of the federal government itself under the lawyer's fire, there can be none so blind as to overlook the true nature of our government: a government of laws, but only those laws which the judges will accept. It would be unfair to call it just a government of lawyers. The judges censor; they do not enact laws. It is otiose today to assail this position as one of usurpation. It exists. But it may be necessary to confine judicial supremacy to narrower limits, if it is not to abuse the power it enjoys.

It is not my function to consult the omens or anticipate the oracular judgments of the Court, except as they dictate limits in a political problem. I wish to restrict myself to a study of the national powers under the Constitution as a problem of a political order. What lines of policy do they dictate? What remedies exist? What may be tried?

There is much to be said for such a government as ours, with the judges as oracles of the law. A mixed form of govern-

ment, with protection for each class, a government of checks and balances, including the separation of powers and even judicial review, all these devices for preventing domination by any class are classic. Plato in *The Laws*, I daresay and contrary to the usual estimate, made the greatest contribution to the argument for the mixed form of government. The refinements of Aristotle, Polybios, Machiavelli in the *Discourses*, Harrington, Locke and Montesquieu certainly affected the shapers of our American constitutional system in state and nation. Fundamentally the defense of this mixed system of government, with a double or triple system of braking devices on mere popular majorities, rests upon the necessity of having very strong stabilizing factors in a political system: It imposes settled protections about institutions, the chief of which is property. Changes in the institutional basis of a society by ordinary, temporary, or bare majorities are dangerous. A system of checks and balances is designed to prevent such changes and to force experiments to justify themselves before a permanent acceptance is given to them as a part of the constitutional system. The chief danger of judicial supremacy, however, is that it may prevent radical experiments from being tried.

The added feature of the American system which has riveted judicial review upon us is, of course, the federal division of powers. Federalism in the British Dominions, like Canada and Australia, has had the same history of magnifying the importance of the courts as umpires of the federal system. To overrule the court's views as to the balance between the federal government and the member units requires more than ordinary majorities, there as here. The normal adjustments and developments of federal power to new instruments of centralization such as railroads, automobiles, air traffic, radio, electric power transmission, etc., have been accomplished in these Dominions by the same means as with us—i. e., through judicial expansion of federal powers. There as here, the courts have occasionally insisted upon a "States' Rights" view that prevented any effective regulation.

But in these Dominions there has never been any assertion that the courts had the right to censor social policy as they have in the United States. The British theory has relied upon responsible political rather than upon judicial control in this sphere. The danger, plentifully apparent in our system, that

the courts would misuse their censorial powers to prevent radical social experiments of any character has not existed in the British Dominions, where parliamentary supremacy was acknowledged. That makes it all the more significant that the question of constitutional amendment for an increase of federal powers has arisen in Canada and in Australia. In Canada to-day it is the foremost political question, as it is with us.

The simple explanation of the matter is that where the courts have the right to say that the federal legislature may not act because the matter properly falls into the competence of the states, a denial of the power to the federal government may prevent any effective governmental action whatever. Some types of governmental regulation can only be accomplished by the central legislature. Provinces and states will not, and perhaps they can not, pursue policies of sufficient uniformity to control matters like uniform marketing acts, a minimum standard of social legislation in matters like child labor, electrical power distribution, control of corporate finance and similar problems. The result is that the same ironical reversal of policies which is making the Republicans good Jeffersonians in this country, so far at least as the doctrine of States' Rights goes, has also shown itself in Canada and Australia. The true conservatives, by whatever name they are called politically, have retired behind the bulwark of the federal units to escape regulatory action by government; they are fighting a rear-guard action in the courts and counter-attacking the advocates of social legislation by charging the latter with being disloyal to the Constitution. Presently, no doubt, they will move on to imposing oaths of loyalty to the British North America Act of 1867 (with amendments?) and maybe even to the Statute of Westminster of 1931. This last could safely be included since it appears to rivet the federal division of powers on both Australia and Canada, in the latter case possibly so long as a single major province opposes amendment.

The new battle lines in federal countries are being drawn, then, with the radicals pressing for federal centralization and conservatives turning to States' Rights. But I should like to suggest that the conservative strategy may be a mistaken one on two grounds:

(1) The conservative is generally an isolationist, certainly an "autarchist" in national economic policy, whose tariffs and

imperialist foreign policies combine to produce the need for national management of the economic system. In the long run he produces the very need of greater national power to adjust the domestic economy by the governmental intervention in behalf of special interests that has characterized Hamiltonian policy from the beginning. He cannot be a Jeffersonian about States' Rights, alone, with hope of success.

(2) In the second place, the conservative policy of retiring behind state lines simply encourages indirect attacks on his position through the taxing or the spending power. The Supreme Court may, at least for some time, limit the derived federal police power under the interstate commerce clause as strictly the *Schechter* decision on the N. R. A. indicates that it will. It may even curb the direct power of using taxation to accomplish social policies, as it did in *Bailey v. Drexel Furniture Company* to rule out this flanking strategy against child labor. This trend may go so far as to throw out processing taxes under the A. A. A., though my guess is that the Supreme Court will not do this, for reasons of policy. I should go even further and grant that there is probably enough conservative sentiment capable of being mobilized around the sacred ark of the covenant to prevent, at this moment, any sweeping amendment to the Constitution that would centralize control over the economic system, even to the degree that Mr. Raymond Moley and others have advocated.

Suppose all this to be true, it still does not advantage permanently the conservative cause. For the purse-strings of the nation, untied by the income-tax amendment (the 16th), remain in the hands of the voters, that is to say in the politics of pressure groups, pork-barrel and log-rolling. What cannot be accomplished directly will be undertaken by indirection, to wit, by the contingent bribery of federal subsidies. The Supreme Court is estopped from controlling the income tax, inheritance taxes and the like. It has never dared up to the present time to question the federal government's power to disburse money to the states on any terms settled by Congress. Oddly enough it was Jackson, so often treated as the great debaucher of our politics through the spoils system of patronage, who just over a century ago made the most effective stand against this system. His strict-constructionist doctrines in vetoing the Maysville Road Bill have long been overridden by a thousand precedents.

The Court itself has upheld education subsidies to the states and any number of adventures such as the Federal Farm Loan Bank, though the Gettysburg Electric Railway case (160 U. S. 668 [1896]) contains the only direct sanction.

If the Supreme Court should now attempt to reverse this long history and to find means of control for which it refused to look in *Massachusetts v. Mellon* and *Frothingham v. Mellon*, the Court would endanger its whole position. Nothing could be better calculated to give a real handle for a constitutional amendment, perhaps even for a successful attack on the Court's judicial supremacy. To limit other avenues of federal control may well serve, therefore, only to increase the tendency to resort to federal spending as the one alternative politically left to an administration bent on social reforms. The technique incorporated in the Social Security Act shows how the thing can be done. Recent evidence from the Kentucky elections amending the State Constitution by a three-to-one majority in order to permit old age pensions, shows how popular it will be. Conditional grants may be used to accomplish minimum wage legislation, to outlaw child labor, and to establish a number of other social policies, just as they have been used in education.

Professor Corwin in his *Twilight of the Supreme Court* has put this with his customary neatness:

The success of the spending power in eluding all constitutional snares goes far to envelop the entire institution of judicial review, as well as its product, constitutional law, in an atmosphere of unreality, even of futility. With the national government today in the possession of the power to expend the social product for any purposes that seem good to it; the power to make itself the universal and exclusive creditor of private business with all that this would imply of control; the power to inflate the currency to any extent; the power to go into any business whatsoever, what becomes of judicial review conceived as a system of throwing about the property right a special protection "against the mere power of numbers" and for perpetuating a certain type of organization?

And one might add what becomes of States' Rights, when bribery may accomplish what is denied to direct control?

"How does all this affect conservative strategy?" one may ask. May not conservatives feel that they prefer to give battle by opposing indirect subsidies rather than by opposing a direct centralization acknowledged to be constitutionally valid? They prefer, it may be, to fight grants to the states rather than

a national Townsendism, capable of acting directly. But are they not still mistaken in their strategy? The Senate of the United States is so constituted as to make bribery to the states peculiarly attractive to the small and poor states. It is more difficult for representatives of large and wealthy states to make head against this type of aid than to fight a national act, which their constituents can recognize in its immediate bearing.

Elsewhere¹ I have suggested that only by strengthening the executive with an item veto, and even by the right of a single dissolution of Congress, can responsible national control over the spending power be achieved. It would be necessary, further, to take the spending and taxing power from the Senate, misrepresentative as that body is. W. B. Munro has suggested a joint session in the event of a deadlock as the method of accomplishing this—a method resorted to in South Africa with some success. Short of these remedies, I see no adequate control in prospect for our national spending power, to protect it against sectional politics and log-rolling. Our tariff did more to debauch our politics and encourage waste than any other agency in the nineteenth century. Today the methods of tariff legislation threaten to characterize all our spending policy.

But may not Professor Corwin be wrong? May the Court not be bold enough to reverse precedents and take a bold stand on the spending power which would rule out federal subsidies to the states? It may be. Professor Corwin proved to be a very bad guesser on the Court's attitude toward delegated legislation and the interstate commerce clause as it affected the N. R. A. He may be wrong again.

If he is, however, it is certain that the Court will have risked its whole power in a way it has not been willing to do since the Dred Scott decision. The reaction against judicial supremacy pushed to such lengths as to control the uses to which federal money is put would be politically explosive. That is why my own guess is that the Court, headed by a Chief Justice who is very much alive to the politics of judicial review, will avoid drawing down upon it the wrath of farmers. Farmers will find it most difficult to understand, even if some lawyers do not, why tariffs can be and regularly are raised by taxes in such a way as to benefit special classes of industries, if taxes cannot be laid on other products in such a way as to benefit farmers. It is im-

¹ See my *The Need for Constitutional Reform*.

possible within the limits of this paper to argue the constitutional merits of the claim that by the general welfare clause under which taxes must be levied is meant only the "national general welfare", not that of a particular class of producers. It would seem, however, that the Court's reasoning in the *Nebbia* Case for fixing milk prices affecting primarily milk producers would adequately meet this argument. It would seem to meet as well the argument that the act contravenes the Fifth Amendment by the taking of private property without due process of law and without compensation "for what purports to be a public use but in fact for a private use . . ." as the brief for the receivers in the *Hoosac Mills* Case before the Supreme Court emphasizes. The case of *Nebbia v. New York*, as I have elsewhere tried to show, is based upon a theory of the organic interdependence of the modern economic community, so that producers' benefits are held to be also consumers' benefits. It is certainly open to the Court on the basis of the precedents cited in the government's brief in the *Hoosac Mills* Case to sustain the law. In this instance delegation of legislative power to tax presumably is as carefully safeguarded as were the flexible tariff provisions already upheld.²

As national powers stand at the moment, though, the Court's new emphasis on Coke's version of the legal tag "*delegata potestas non potest delegari*" constitutes a grave practical limitation on the use of national powers. In the *Hot Oil* cases³ there was something to say for the opinion on the ground that a good deal of carelessness in drafting the law (and more in preserving due process for executive orders under it) did in fact exist. The sweeping character of the Court's language on this point in the *Schechter* decision, as much as in respect to its narrow definition of interstate commerce,⁴ may be regrettable in the light of the necessities of modern government. The *Report of the Committee on Minister's Powers*⁵ in England showed the necessity of delegating wide discretionary authority to execu-

² Cf. the *Argol* list cases and *Hampton & Co. v. U. S.*

³ *Panama Refining Co. v. Ryan* and *Amazon Petroleum Co. v. Ryan*, 293 U. S. 388 (1935).

⁴ See T. R. Powell in *Harvard Law Review* (Dec. 1935) and *Schechter Poultry Corp. et al. v. U. S.*, 55 Supreme Court Reporter 837 (1935).

⁵ *Cmd.* 4060 (1932).

tive departments and commissions. Congress cannot undertake the detailed statement of all the criteria which the Court might find reasonable in order to control executive authority over the vast range of modern governmental activity. For the Court to push its insistence so far would be to deprive the nation of the flexibility of administration necessary to effective government. The A. A. A. may well prove to be a test case of the Court's real feeling on this point.

At the present time we stand with a narrow judicial view of interstate commerce which would limit the concept to the physical passage of an article across state lines.⁶ This, of course, may be altered subsequently by a reversion to the broader view expressed in the cases under the Anti-Trust acts, under the Interstate Commerce Commission, and in *Swift v. United States*, *Stafford v. Wallace*, and *Chicago Board of Trade v. Olsen*. Similarly we are faced with a rather sweeping limitation on the legislature's right to delegate legislative power. What remedies exist, if these court attitudes are maintained?

(1) State Action. It is suggested, often enough, that the states may by appropriate action achieve whatever uniformity is needed without federal bribery or coercion. The history of the efforts to get uniform state laws even on the most fundamental business practices is not encouraging. Professor Felix Frankfurter has been a great advocate of interstate compacts. But few serious students of social legislation have felt that this method offered much hope.⁷ Even for administrative projects like the Colorado River Compact, all the difficulties and weaknesses which mark the history of international conventions have characterized the story of the compact.

The fact is that the states have ceased to be adequate to the economic needs of government. Their boundaries are unreal limits of either social or economic policy. Fine scorn has been heaped upon Mr. Roosevelt for his "horse and buggy" remark about the Court's views of state rights. But the epithet errs only in its inadequacy. Even a horse and buggy régime produced a broader concept of interstate commerce in Marshall's time than the Court has indicated.

⁶ This is the narrow view that stems from *Coe v. Errol*.

⁷ See Jane Clark in *POLITICAL SCIENCE QUARTERLY*, Dec. 1935.

This is not the place to determine whether a more appropriate unit than the state would make our federal problem a simpler one.⁸ Regional units may be treated as utopian solutions for the practical purposes of the present. And in any case federal powers which transcend regional powers over commerce would still be necessary.

(2) A second possibility is of course that outlined in the Social Security Act—i. e., the achievement of federal social norms by contingent subsidies to the states. This method has the already noted dangers of further debauching our spending power, but it will certainly be used, and is politically the most available form of federal power.⁹ The limits on its application are difficult to foresee, unless the Court reverses all previous precedents.

(3) The direct use of taxation to accomplish social ends has had a dubious limit prescribed for it in *Bailey v. Drexel Furniture Company*. Whether this limit excludes the use of the processing taxes of the A. A. A. remains to be determined. It certainly does preclude taxing the products of industry to enforce labor legislation.

(4) There is the bare possibility that the language of *Holland v. Missouri* will encourage a resort as a desperate last expedient to the use of international treaties, such as labor conventions, to give a basis for federal power that might be denied through the use of the power over interstate and foreign commerce, or even to the taxing clause. Compacts with Canada along these lines can hardly be extended very far. But both countries show an interest in bringing the treaty power to the support of an otherwise inadequate scope of federal powers. The courts in both have shown a reverence for statutes passed to enforce treaties that is surprising. There is real logic and *bona fides* in attempting to equalize social legislation in countries which wish to increase their exchange of goods.

(5) A very important and up to recently unexplored possibility lies in the use of federal credit as the basis for loans to the states rather than for outright grants-in-aid. This fiscal

⁸ See my suggestions in *The Need of Constitutional Reform*, esp. pp. 191-198, and W. B. Munro in *Atlantic Monthly*, November, 1935.

⁹ It has been treated historically and descriptively in A. F. MacDonald, *Federal Subsidies*.

control can become the most powerful means of exerting federal influence, as the relief program has already indicated. It has the same dangers that grants-in-aid have and that Jackson's distribution to the states showed.

A particularly useful and beneficial form of control, however, could be achieved by erecting a Federal Loan Council after the Australian model. Nothing in the history of federalism is more interesting than the success of this body in promoting Australian recovery. By underwriting with the federal credit those local and state loans which meet approved conditions for amortization, budgetary policy, etc., the Australian Loan Council has successfully aided conversion operations that save to the taxpayers of that country millions of pounds in interest charges every month. No form of federal centralization is more necessary than to enforce some standardization in the chaos of public finance. Out of such a Loan Council should come a better allocation of tax revenues, and an impetus to the most essential reform in our system—i. e., the rationalization, through consolidation and elimination, of many of our local government spending units. In this region, indirect control is the most available, and politically the only possible method. Such a Federal Loan Council might readily grow out of the R. F. C., with appropriate changes.

(6) This power would not, except by extreme indirection, affect changes in social policy on the scale of national minimum standards. *But the direct lending powers of the government do afford such a power, particularly as combined with its hitherto undisputed power to enter almost any type of business, or to participate in such business through loans or stock ownership.* The degree of influence attained by the R. F. C. over the banking system in this manner is great enough without reference to the Banking Act of 1935 or the activities of the Federal Deposit Insurance Corporation, or to the numerous loan agencies such as the H. O. L. C., set up under federal authority. Passing over the unnecessary stupidity of incorporating nearly all the twenty-seven government corporations under state rather than federal charters, there they stand, from the T. V. A. down to the Rural Rehabilitation Corporation, all exercising tremendous powers of government within the boundaries of states, though the disguise is economic. Some of them may be deemed by the Court not to be necessarily or properly related

to the specified powers of Congress to which they are attached. But to rule them out, the Court will have to reconstrue, and harshly, the dearest doctrine of John Marshall—that of implied powers. My guess, again, is that the Court will do no such thing. These activities have powerful political support. They spend money.

My own feeling is against the multiplication of such government corporations, over which coördinated administrative control is very difficult if not impossible. The only excuse for treating these governmental agencies as semi-public corporations in law is to remove them from direct political pressure for patronage and from the dead hand of departmental bureaucracy. But while my dislike is only a matter for argument, the Court's dislike would be decisive. That is what the real significance of judicial review is. *The New Yorker* ran an amusing cartoon of two engineers, presumably construction bosses, in a perfect maze of new building operations. One has just rushed up to the other with a telegram in his hand. Underneath is the legend: "My God, Henry, the Supreme Court has just said the whole damn thing is unconstitutional!" The Supreme Court may do that. But it will be treading on the dangerous toes of the spending power if it does.

There seems to be one other avenue of federal control over business that remains comparatively unexplored, though the British experiments have been highly successful. It has already been opened up by the acquisition of bonds and in some cases of voting stock by the R. F. C. in a wide variety of enterprises, chiefly banks, railways and public utilities. It would seem legally open to the federal government to turn the technique of the holding company, by which business has made light of state lines and anti-trust laws, against the holding companies themselves. Voting stock control with participating government directors, appointed to whatever degree seemed necessary, might well have been a more effective real agency of control than "death-sentence" legislation plus the S. E. C. Commission regulation has not had a brilliant record here or elsewhere. It is external control, at the Court's mercy. Might not government partnership in our wasting natural resource industries have proved more effective than the Anti-Trust laws? I can see no sound objections to the same policy of participation through stock ownership and appointed directors in the national

and even in the regional public utilities. The S. E. C. can depend, in the last analysis, only upon publicity for its more positive control over the abuses of corporate finance. Would not publicly appointed directors on the "inside" be a more effective or an additional method? Nor am I to be terrified by someone's throwing "*Quis custodiet custodes ipsos?*" at my head. All government must answer that question. The R. F. C. has had a quite remarkable record.

These then are ways still open, which the Court will close only at great peril to its own position. To block them would be to dam up the necessary functions of government—necessary, i. e., unless we are to resign ourselves to the hopeless anarchy and tyranny of a so-called *laissez-faire*. The facts of such a system would be private exploitation of the commonwealth by uncontrolled monopolies and by dangerously large aggregates of wealth.

I suggest two possible remedies for the possibility of the Court's losing all sense of relation to its true position—a position which should be that of interpreter, not that of censor. I believe both might well be accepted by the Court as amendments to the judiciary acts, under the constitutional power of the Congress. The first is a properly safeguarded power, based upon the Canadian principle and that practised in at least half a dozen of our states including Massachusetts and California, of requiring the Court to give advisory opinions. This proposal has met with rather savage criticism from Professor Frankfurter as well as from the Trumpeters of the Constitution. But I cannot see what the former gained by delaying reference of the N. R. A. to the Court for two years. And if the Court refused to accept the mandate from Congress, we should be in a better strategic position to deal with its claims to judicial supremacy on their merits.

The second would be to require at least a two-thirds majority of the Court to declare unconstitutional any law or act of a state or the federal government.¹⁰ When the decision as to what

¹⁰ I may point out here that to treat this proposal as being discredited by the experience of Ohio, under the absurdly drafted constitutional provision, for limiting judicial review in that state, simply involves a *non sequitur* of the most elementary type. The Ohio provision *does not* "prevent the Supreme Court of that state from declaring an act or statute *unconstitutional* save by an extraordinary majority." What it does do is to prevent the Supreme Court

is arbitrary and unreasonable rests upon the opinion of a single judge, one wonders. The presumption surely ought to be in favor of the constitutionality of so doubtful an act, or "due process of law" becomes the travesty of a legal concept.

The court is now enjoying a field day, and its bag of unconstitutional laws may be a very heavy one. But it would be a grave pity if lack of judicial statesmanship should close the avenues of federal control over the nation's economic life so as to precipitate a frontal attack on the whole system of judicial supremacy.

In the event that the spending power is attacked, that may well be the case. And unless the Court modifies its own restriction of the interstate commerce power, we may find a constitutional amendment forced upon us as was the Sixteenth by the *Pollock v. Farmers Loan and Trust Company* case.

After all, precisely where would lie grave danger of the abuse of states' rights by a Congress, with a Senate composed as ours is, through a constitutional amendment to this sweeping effect:

"The Congress shall have power to regulate commerce, manufactures, agriculture, and the extraction of natural resources throughout the United States"?

We stand in more danger from sectionalism than we do from centralization in our national legislation.

In the light of this analysis I once more venture the question: May not conservative strategy be mistaken in forcing the use and abuse of the federal taxing and spending power to accomplish by indirection national policies that could better be judged—and if necessary opposed—directly, on their own merits? It is the temptation to accept federal funds without thought of the effect on the economic system which is most destructive to vigorous local self-government in these United States.

of Ohio from reversing the decision of the inferior court from which appeal is taken—*no matter what that decision might be*—save by a vote of all the justices except one. Naturally such a constitutional provision has produced legal chaos. The Supreme Court of Ohio is often forced, under this constitutional amendment and from want of unanimity, to sustain decisions of inferior courts that have declared *unconstitutional acts which the Supreme Court itself would have upheld*. This has nothing in common with the simple proposal limiting the court in declaring acts unconstitutional that I have advocated above. To confuse the two methods is due either to childish logic or to political malice.

REMARKS BY THE CHAIRMAN

HON. WILLIAM L. RANSOM: I am sure we are all greatly indebted to Professor Elliott for his very thoughtful and stimulating analysis of the historical background of the present situation. Your next speaker will discuss the topic "The States Under the Constitution". Mr. Dickinson has been a lawyer of distinction, a noted teacher of law. He has served with great credit in the Department of Commerce of the Government of the United States, and is now the Assistant Attorney General of the Department of Justice, handling legislation and litigation that attracts nation-wide attention. He comes to us today from the atmosphere of direct and first-hand experience with the problems which we are discussing, experience gained in the courtroom and in the litigation of these controversies on which so much depends. It is a pleasure to present to you the good friend of many of us, the Honorable John Dickinson. (Applause)

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THE STATES UNDER THE CONSTITUTION

HON. JOHN DICKINSON

Assistant Attorney General of the United States

I.

IN this country the problem of the relation between local and central government, the question of the line of demarcation between the powers of local authorities on the one side and central authorities on the other, is, at least so far as relates to the division of functions between the state governments and the federal government, a constitutional question, a question of law rather than of expediency or policy. In the first instance, therefore, the question is always not as to what is desirable, not as to what is expedient, or what would be the most efficient or satisfactory line of demarcation from a political or administrative or economic standpoint, but simply what is the line laid down and marked out by the Constitution, if the Constitution *does* lay down and mark out a line. Like so many questions that confront us in the field of American government, therefore, the question of efficiency and social desirability is thus inevitably pushed into a secondary position where it cannot be faced until after the constitutional maze is threaded and the constitutional issues overcome.

However, it is not merely appropriate but needful to recognize that the Constitution, like all great fundamental documents, does not give an immediate and unambiguous answer on every question of detail within the broad field of subject matter that it covers. Whatever the school texts may teach, whatever the advocate in the heat of his pleading may urge at the bar, we all know and every lawyer knows that there are many important points, or points which may become of importance, on which the Constitution does not pronounce with an unambiguous voice. If this were not so a good deal of the practice of the constitutional lawyer and much of the need of clients for his services would vanish. The Supreme Court itself in almost

every constitutional case that it hears and in almost every constitutional decision that it renders is real evidence, as the lawyer puts it, that the most fundamental clauses of the Constitution stand in need of continuing interpretation. Not all the precedents that have gathered in the Supreme Court reports through the years have foreclosed all points of doubt, all points at which further development and interpretation can take place.

Where such room for doubt and interpretation still remains, considerations of policy, of expediency, of governmental efficiency and social need cannot be banished. They crowd into interpretation unconsciously, if not consciously. When a novel question of law arises in the field of constitutional law, as in the field of negotiable instruments law or corporation law or the law of domestic relations, after the precedents have been searched and found to stop short, as they do, of a complete answer, since otherwise the question would not be a novel one, there is a gap between the settled law and the decision which has to be made, and before that decision is or can be made the gap is filled in consciously or unconsciously by considerations which are not of an exclusively legal character. Courts have always acted thus and necessarily must act thus, nor is it to their discredit that they do. This gap between the precedents and the new decision is the opening and the opportunity within the framework of the Constitution for conceptions of what is efficient and expedient in the relations between central and local government to influence the determination of the line between federal and state powers.

We must also remember that the Fathers of our Constitution fully contemplated the need, and provided the means, for its amendment. As one of them stated in arguing for the ratification of the Constitution by the states,

If all the wise men of ancient and modern times, all the Solons, Lycurguses, Penns, and Lockes, that ever lived, could be assembled together for deliberation on the subject, they could not form a constitution or system of government that would not require future alterations. . . . The British government, which some persons so much celebrate, is a collection of innovations. . . . There is a continual flow in human affairs. The ceaseless waves have carried man on to . . . discoveries, greatly meliorating his condition. There are more discoveries yet to be made, . . . While other sciences are advancing, why should we supinely or vainly suppose, that we in the Argo lately con-

structed by us, have already reached the "ultima thule", the farthest point in the navigation of policy?

Every improvement in our Constitution that can be discovered, should be immediately adopted as a part of it.

And that was written in 1788.

The possibility of amendment which the Constitution expressly embodies in its provisions answers the argument that Americans should refrain from considerations of political efficiency and social desirability in all instances where such considerations have not already written themselves into the existing decisional gloss on the Constitution. Not merely is opportunity open for their embodiment in future decisions, but there is always the ultimate possibility of their adoption, if felt with sufficient force of public opinion, in the form of amendment to the Constitution itself.

The practical difficulty of framing constitutional amendments which shall not be too broad and yet not too narrow, which shall be comprehensive enough to include the desired improvement without going so far as to admit other things that may not be desired, is sufficiently serious to throw the balance of advantage decidedly in favor, wherever possible, of the more gradual course of constitutional development through the decisions as compared with the method of amendment. If, however, the expected or desired development through the decisions does not take place, the possibility of amendment saves us from the fate of having to banish from our political thinking, as some would have us do, all attention to questions of what may be socially or politically desirable in our governmental arrangements.

It is some of these issues of desirability and their bearing on issues of constitutional law in the field of the relations between the nation and the states that I wish to discuss this morning. They group themselves generally in public discussion around the concept of what is called local self-government, its importance, its value, its necessity. Today great emphasis is being placed, and properly placed, on local self-government, and on no issue is it more important that a fair balance of the advantages and the disadvantages, the possibilities and the limitations, should be struck in the interest of an enlightened public understanding of some of the major political and economic problems with which the United States is confronted.

II.

The advantages of local self-government are substantial and practical if properly understood. Too frequently they are obscured and subjected to consequent misunderstanding by presentation in a purely negative and empty way as the opposite of the supposed disadvantages of an abstract bugbear called centralization. In the abstract, and apart from concrete instances, there is no more merit or demerit in centralization than in local self-government. The merits and demerits of both are practical and can only be understood in the light of their practical operation and consequences. In appraising the advantages of local self-government, we are not worshipping at the altar of an abstract idea, but seeking to determine what substantial benefits it confers on men and women. From this standpoint, the main benefits of local self-government free from interference, or at least from excessive interference, by a superior political authority from without, can be summarized as three in number.

First there is the advantage of the superior knowledge of local needs and the keener interest in local problems possessed or supposed to be possessed by the relatively small groups directly affected. People ought at least to know most about the things closest to them. The residents of a ward of a city or a county or a state are in a position to know more about their schools and roads and lights and sewers than they know about foreign politics, and conversely, their knowledge of the subjects mentioned can be expected to be more intimate and accurate than the knowledge possessed by officials a hundred or a thousand miles away. At the same time, their interest is keener. If they themselves are not interested in better schools or better lights or better sewers, it cannot be expected that distant officials will be.

The second advantage of local self-government is that it places responsibility directly on those who are in the most favorable position to act upon local subjects. If local officials are not free to take action in connection with local matters without the slow and tedious necessity of securing consent or authority from a distant source, there is an incentive to inaction, a consequent evasion of responsibility, and as a result, an effective obstacle interposed to the pressure which could otherwise be

exerted by those who feel the pinch of local conditions and are anxious to have something done about them.

The third advantage of local self-government is the opportunity frequently stressed of experimentation in dealing with local problems in a locally devised way that may afford suggestion and guidance to other local communities as a result of the success or failure of the attempt.

It would be idle to contend that local self-government, like other human institutions, does not present disadvantages to offset at least some of its advantages. There is first of all the danger of stagnation and ingrowing, a danger of which all of us are aware when, fairly or unfairly, we refer contemptuously to "hick towns" and "Main Street". If it is true that growth and strength must come from within, it is no less true that stimulation and inspiration come frequently if not most frequently from without. The community which leads an absolutely exclusive and self-centered life, which is not subjected to impulse and pressure from an external source, is almost always slow to adopt improvements, to raise the level of its people, and to contribute in its own turn to the improvement of the larger community of which it forms a part.

In the second place, there is always a danger that the exclusive local management of local affairs may develop into a system of "log-rolling" between influential local interests, which results in the disregard of the general interests of the community. The control which corrupt rings, and, more recently in some of our smaller communities, which gangsters have been able to exert over local governments, is a fresh illustration of the old truth that sometimes no local agency is strong enough to control anti-social local forces in the public interest without aid from without. This truth was brought vividly home, for example, to the Italian city-states of the twelfth and thirteenth centuries, which found that they could control their unruly elements only by importing an outside official, a podesta. No local official was or could be sufficiently free from local entanglements, local pressures and local partisanship to be independent in applying and enforcing the law.

Finally, where government is completely decentralized and local units are exempted from the supervision and control of a central authority, there have always tended throughout human history to grow up bitter and unfruitful rivalries between such

units, which have in consequence expended their strength and wasted their resources in petty conflicts of greater or less intensity for unworthy objects of ambition, instead of contributing to the progress and well-being of their people. This tendency displayed itself among the Greek city-states, the feudal principalities of Medieval Europe, and the smaller countries of Eastern Europe in our own time. If the dangers of centralization can be effectively portrayed by reference to the example of the Roman Empire, the dangers of local self-government on the other hand are no less gruesomely depicted in the history of the Italian city-states and the Balkan kingdoms.

Apart from the general considerations so far advanced, it must also be recognized that certain of the inherent disadvantages and limitations of local self-government tend to be increased by special circumstances and conditions, particularly when the local communities in question form part of a well-recognized and well-integrated larger social community. One difficulty results, for example, from the inevitable drawing away of the stronger and more able citizens to the larger centers of population and economic activity elsewhere, and to the tendency of those who stay behind to center their interests on the affairs of these larger communities. To take a familiar example, this is the case today in many of the New England hill towns which once were the outstanding example of local self-government. In most of the towns of Massachusetts today the inhabitants are far more interested in what is going on in Boston or Worcester or Springfield, in the movies, the ball games, the economic opportunities afforded by these larger centers, than in what is happening in their own rural community. Similarly in these larger centers, many of the more vigorous and active citizens are more interested in national affairs and national politics than in local school boards and city councils.

A second factor, analogous to the first, is that local communities may, and frequently do, under the integrated conditions of modern economic life, come to be largely dependent economically no less than socially on outside factors. Not merely does the economic prosperity of the Massachusetts hill town come to depend on the market afforded to its farm products by the adjacent industrial centers, or on the prosperity of the more distant cities which contribute its quota of summer residents, but the potato growers of Maine come to depend on the market

conditions prevalent in Pittsburgh and Cincinnati, the steel communities of Pennsylvania and Ohio depend on the sale of automobiles in Kansas and Missouri and Georgia, and the cotton communities of Texas and Mississippi on the demand for raw cotton in Japan and Germany.

The growth of such interdependence between communities means that many of their most vital interests have grown completely beyond their own local ability to control or even to influence. When this occurs, the range of effective local self-government is obviously greatly restricted. However keen may be the interest of the community, however accurate may be its knowledge, its power to help itself to solve some of its most pressing problems is simply not present. If those problems are to be solved, if conditions are to be improved, the community can act only by influencing or contributing to influence the action of the larger community which is broad enough in its scope to have all or most of the elements of the problem in its power.

Where conditions such as I have described prevail, there is a certain paradox in insistence on too large a measure of local self-government, too absolute an independence of the local community from the larger organization in which it finds itself enmeshed by circumstance. It purchases such independence at the cost of ability to make its influence felt in dealing with the very problems which often most vitally concern it. Instead of contributing to the solution of those problems through the orderly mechanism by which they can be solved in an orderly and effective manner, its only recourse lies in assuming an attitude of antagonism and retaliation toward the other communities upon which it is dependent. In the words of the old adage, it too frequently "cuts off its nose to spite its face."

The fear of centralization which is at the bottom of such a policy is in part at least an unnecessary fear under modern conditions of democratic government. Governments today, central no less than local, are so organized as to respond in their policies to the interests of the individuals and smaller units over which they operate. The day is gone, even under the more absolute types of current government, when a small group of individuals or a congeries of narrow interests at the top could dictate their will to the subjects of government. The community which stands aloof and declines to operate through the clear-

ing house of a central agency broad enough to embrace all the interests which need to be harmonized in the interest of all, simply cuts the bonds which bind it to the larger organization of activities from which it must draw much, or even most, of its sustenance. It thereby creates for itself by its own act many of the evils which it is seeking to avoid. The chains of cause and consequence which are most obvious in the field of international relations are equally present when the urge for local self-government within nations is carried beyond the point of reasonable moderation.

The inferences which would seem to follow from the considerations thus advanced are three in number:

1. That local self-government in the sense of complete local independence from supervision or control by the authority of a wider group should be limited to matters which are in fact purely local—to matters, that is, which are not affected, or only remotely affected, by occurrences outside the local area, and which in turn do not affect, or only remotely affect, the other parts of the broader community. By the test of remoteness I mean that the effect in either or both directions is a matter of comparative indifference and that the consequences produced are not important or significant from the standpoint of vital interests.

2. That the local community should be so geared into the political organization of the larger community as to have its voice in determining the adjustments of those wider interests in which the local community shares.

3. That, conversely, the agencies of central government should be in a position not merely to fertilize local initiative by the stimulus of broader policies, but also to exercise such measure of control over local acts as may be necessary to harmonize as between localities the broader interests upon which the local community depends although it may not be so definitely and keenly conscious of them.

The validity of these inferences is confirmed from the very source to which we most frequently turn for proof of the soundness and necessity of the principle of local self-government, namely, our own English past and the history of local self-government in England. We are accustomed to look back to English local government, the county court, the justice of the peace, the quarter-sessions, as the source of the local self-

government which came to fruition in the New England towns and the Virginia counties of the 18th century. Yet when we examine the English experience in the clear light of history we become aware that there never was a time in England when the link of close and mutual interconnection between local and central government was broken—when the county court was not the King's county court, and the sheriff was not the King's sheriff, and the justice of the peace was not the King's justice. Local self-government there was to a larger degree than in almost any other country, but it was local self-government under the Crown, that is to say, under the central government in all matters in which the kingdom as a whole had an interest.

III.

The factors affecting the scope and limitations of the principle of local self-government apply from the standpoint of political and social expediency to the relations between the states and the federal government in this country no less than to relations between village and county, county and state government, within the several states. The practical issues, the points of advantage and disadvantage, are of substantially the same character. But, of course, as was pointed out at the beginning of this paper, there is an all-important legal and constitutional difference. The state governments are guaranteed their position, their powers, immunities, and freedom from outside interference so far as it extends, by the Constitution itself, and considerations of desirability and expediency must of course yield always to constitutional right.

In this connection, however, there is an important consideration which is frequently overlooked in discussing the position of the states under the Constitution. It is that the Constitution is the source, as it is by all admitted to be the measure, of state rights; that the states derive whatever powers and immunities they possess from the text of the Constitution. This fact is frequently obscured because the powers of the states are expressed in the Constitution in the form of a reservation while the powers of the federal government, on the contrary, are expressed in the form of a grant. It is further obscured by the tendency to think of the Constitution as created by and drawing its authority from the states, a notion which was at one time thought to have been set at rest forever by the out-

come of the Civil War, but which has recurred in recent discussion with almost the same vitality that it possessed when urged by Hayne and Calhoun in opposition to the irrefutable logic of Webster. When applied to the position of the original Thirteen States the argument has a certain appearance of validity. Perhaps the most convincing evidence of its weakness, and of the weakness of the whole position which denies that state rights are derived from the Constitution, is to seek to apply it to the thirty-five states which have become such since the establishment of the Constitution.

Whatever ground there might be for contending that the Constitution is a creature of the original Thirteen States, that contention is certainly not applicable to states which became such under the Constitution, and whose right to be states arose from action taken by the federal government in accordance with the forms of the Constitution. Clearly these states were given their status by federal action or at most accepted a status defined for them in advance by the Constitution. Yet it is well recognized that the position of all the states, old and new alike, is identical in constitutional law, with the inevitable consequence that the status of the old states, as well as the new, can only be regarded as derived from and defined by the Constitution.

There is another important fact of a practical kind brought into relief by observation of the new states created under the Constitution, which now constitute only one short of three fourths of the entire number. This is that they are artificial units, marked out on a map by act of Congress at a time when in most instances their territory was an almost unpeopled wilderness with no organic, social or economic life of its own. They thus did not correspond even at the outset to natural units or interest-groupings, and the life of the nation has developed without regard to the invisible lines that separate them from one another. They are as far removed as possible from the vital individual units which were the city-states of Greece, medieval Italy and Germany, and even from the counties of old England representing in so many instances the remains of Saxon kingdoms or earldoms.

The same thing has come to be true, in almost if not quite equal measure, of even the thirteen original states. As a result of the freedom of intercourse held by the Supreme Court to

have been guaranteed by the commerce clause of the Constitution, and the consequent denial to the states of the right or power to control the movement of goods or individuals across state lines, social development and economic development have gone on without regard to state boundaries. There is far more affinity between northern New Jersey and southern New York than between northern New Jersey and southern New Jersey. There is far more affinity between the eastern shore of Maryland and Delaware than between the eastern shore and the western shore of Maryland. Trading areas, banking areas, distribution areas, areas of social intercourse and of educational influence are not coterminous with the areas of states. In consequence the interests and the problems which arise from economic activity and social intercourse transcend for the most part the ability of any one state to make even a beginning toward their solution, if they reach the point where they seem to require solution.

Those practical considerations cannot of course alter the boundary between state and federal powers fixed by the Constitution. Where, however, that boundary is not defined with particularity but only in broad and general terms, they can and should affect the process of interpretation by which from time to time the provisions of the Constitution are reduced to greater definiteness in connection with particular legislation. From the beginning of our government questions as to the line between federal and state power have repeatedly arisen, to which no certain or specific answer is given by the words of the Constitution. From the beginning powers have from time to time been exercised by the national government which were challenged as not falling within the express grants of the Constitution and as amounting therefore to an invasion of the powers marked out for the states. The three outstanding instances of affirmative exercises of national power thus challenged prior to the close of the Civil War were the power to charter a bank or banks, the power to expend federal funds for internal improvements within the states and to condemn land therefor, and the power to establish a protective tariff. In all three instances it was claimed that since the powers in question were not specifically granted and since they directly and immediately affected concerns which were local in the sense of being located within the states and which the states themselves could regulate, they

transcended the constitutional authority of the national government. In all three instances, however, it has become settled law that the granted powers of the federal government can properly be construed to include them in the light of national needs and interests even though they obviously affect local conditions lying within the field of state power.

Since the Civil War perhaps the major development of national power has been the application of the Fourteenth Amendment and of the commerce clause to restrict and limit state regulatory power by constitutional barriers in addition to the substantial practical barriers already referred to as limiting state power. These developments have been negative. At the same time in numerous instances the granted powers of the federal government have been construed broadly enough to reach local transactions which might legally have been regulated by state legislation, but where the separate action of a number of states was obviously incapable of dealing with the situation because the cumulative effect of the local acts constituted a national problem. This was the case with the Anti-Trust laws, the Pure Food and Drug laws, and the Stolen Automobile law, to name a few outstanding examples. It is probably accurate to say, however, that the exercises of federal power hitherto expressly recognized as valid do not yet, at least, reach so far as to cover the entire field denied to state power, with the result that there has come into existence a twilight zone of uncertainty within which it is possible to argue at the very time when regulation is more needed or when the public seems to think that regulation is more needed than ever before that there are subjects which cannot be regulated by either the nation or the states in spite of the fact that there is no express constitutional restriction upon such regulation.

In this state of our constitutional law it is advantageous to recur to the considerations as to the meaning and limitations of local self-government advanced earlier in this paper. If the creation of such a twilight zone is in the interest of throwing the constitutional protection around an economic doctrine of *laissez-faire*, that is one thing. If on the other hand it is as it purports to be in the interest of preserving local self-government, the meaning of local self-government as applied to the states of the American Union under current conditions should be carefully canvassed. If it is so canvassed and not treated

as a mere abstract barrier to anything to which the name of centralization can be applied, I believe that two canons will or should result for aid in the process of constitutional interpretation:

1. The concept of a local transaction, removed from the valid exercise of federal power, should be reconsidered. In one sense every act is local and takes place on the territory of some state. To apply such a conception as a restriction of national power would deny national power altogether. A local transaction in the sense of a transaction removed from national power should be defined as one which is indifferent or unimportant to such national interests as can be reached and regulated by the exercise of one of the granted powers of the federal government.

2. The existence of definitely national interests should be clearly recognized and should serve as an aid in the interpretation of the scope of the granted powers.

If these canons were accepted there could be no invasion of local government by the states in any real sense since the powers recognized as existing in the federal government would not be powers which as a practical matter, and even apart from legal limitations, the states could use. There is one final respect in which a more satisfactory relationship between state and federal power could be furthered. It would consist in a far greater employment than at present by the federal government of state officials and state agencies in the exercise of its functions. To make this possible probably a constitutional amendment would be needed, but if it were made possible it would avoid the great and unnecessary duplication of state officials by federal officials which perhaps more unconsciously than consciously constitutes, I believe, one of the principal sources of objection to the exercise of federal power.

REMARKS BY THE CHAIRMAN

HON. WILLIAM L. RANSOM: We thank you, Mr. Dickinson, for your scholarly and forward-looking paper.

I am very sorry to have to announce that Judge Phillips, of Denver, our next speaker, is unable to be here. Mrs. Phillips had suddenly to undergo a very serious major operation on Sunday. Although the

prognosis is favorable, Judge Phillips wired that he was not able to leave her bedside. I wish that he were here. He is the Senior Circuit Judge of the United States Circuit Court of Appeals for the Tenth Circuit, which embraces many of the states in the heart of the West, the area west of the Rocky Mountains. He also has been for two years the President of the National Commissioners of Uniform State Laws, which is a body composed of representatives or delegates chosen by each of the states; and this national conference has achieved a great deal, in the direction of uniformity of legislation through the action of the respective states.

Judge Phillips has, however, sent his paper, and I have been asked to read it in part, which I shall do, with your permission. His topic is "Constitutional Limitations on Social Legislation". I shall read his paper in part * and without comment.

* The paper is printed in full on the following pages.—Ed.

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CONSTITUTIONAL LIMITATIONS ON SOCIAL LEGISLATION

HON. ORIE L. PHILLIPS

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for the Tenth Circuit, Denver, Colorado

TO draw a clear line of demarcation between social legislation that is within, and without the powers of Congress, is not in my opinion possible. Certain limitations may be pointed out, and in a general way the orbit of federal power with respect to such legislation may be defined.

The powers delegated to the Congress are set forth in Sec. 8 of Art. I of the Constitution.

Clause 1 of Sec. 8 in part reads:

"The Congress shall have power

"To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States."

Does the phrase "to . . . provide for . . . the general welfare of the United States", grant power to the Congress to enact social legislation? It seems to me that a proper consideration of the subject assigned to me requires an answer at the outset to this important question. The answer depends on whether the phrase is an independent grant of power, or solely a limitation on the taxing power.

Throughout the history of our nation this phrase has engendered much discussion, and divergent views have been expressed from time to time by eminent statesmen and publicists. But it was not until recently that the courts undertook to determine the meaning, purpose and effect of the general welfare clause. In a dissenting opinion in a recent case, the view was expressed that this clause confers "upon the Congress an independent and substantive power, ceded to it by the states, totally distinct from those conferred in the succeeding clauses of Article I, Sec. 8."¹ In another opinion recently handed down,

¹ *U. S. v. Certain Lands in City of Louisville* (CCA 6) 78 F. (2d), 684, 688.

it was held that the general welfare clause is solely a limitation on the taxing power.²

In General Washington's desk copy of the Constitution printed for use by the members of the Constitutional Convention, the phrase: "To lay and collect taxes, duties, imposts, and excises" and the phrase "to pay the debts and provide for the common defence and general welfare", while included in the same paragraph, were separated by a semicolon. That copy was turned over to a copyist for engrossment on parchment. The copyist substituted a comma for the semicolon. The argument has been advanced recently that the semicolon indicated that the members of the Convention intended the welfare clause to be an independent grant of power.³ This argument overlooks the fact that the engrossed copy which was submitted to the states, not the desk copy, is the Constitution.

The proceedings of the Convention disclose that the clause, "to pay the debts and provide for the common defence and general welfare of the United States, . . ." was first brought forward in connection with the power to lay taxes, was originally adopted as a qualification or limitation of the objects of that power, and was not discussed as an independent power, or as a general phrase pointing to or connected with the subsequently enumerated powers; and that another amendment which would have given such a general power was proposed but never adopted, and seems silently to have been abandoned.⁴

² *Kansas Gas & Electric Company v. City of Independence* (CCA 10) 79 F. (2d), 32.

³ *Congressional Record*, August 17, 1935, p. 14019.

⁴ In the first draft of the Constitution, the provision respecting taxation read: "The legislature of the United States shall have power to lay and collect taxes, duties, imposts, and excises." It contained no words qualifying or limiting the power granted.

Later certain matters, among them a proposition to secure the payment of the public debt, to appropriate funds exclusively for that purpose and to secure the public creditors from a violation of the public faith when pledged by the authority of the legislature, were referred to a committee of five. The committee of five reported that there should be added to the provision respecting taxation the following: "For the payment of the debts and the necessary expenses of the United States, provided, that no law for raising any branch of revenue, except what may be specially appropriated for the payment of interest on debts or loans, shall continue in force for more than — years."

Later a motion to amend the provision respecting taxation to read, "The

In the early history of the nation, divergent views respecting the general welfare clause were expressed by two eminent statesmen.

Madison expressed the view that it is limited by the specifically enumerated powers granted to the Congress. He said:

Whenever . . . money has been raised by the general authority, and is to be applied to a particular measure, a question arises whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it may be applied to it. If it be not, no such application can be made.⁵

On the other hand Hamilton expressed the view that, subject to the qualifications that "all duties, imposts, and excises shall be uniform throughout the United States; . . . no capitation, or other direct tax, shall be laid, unless in proportion to the census . . .," and "no tax or duty shall be laid on articles exported from any State", "the power to raise money is plenary and indefinite, and the objects to which it may be appropriated . . . no less comprehensive than the payment of the public debts, and the providing for the common defence and general welfare"; that the phrase general welfare "is as comprehensive as any that could have been used" and embraces "a vast variety of particulars, which are susceptible neither of specification nor of definition"; that it is "left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which . . . an appropriation of money is requisite and proper"; that "whatever

legislature shall fulfil the engagements, and discharge the debts of the United States, and shall have power to lay and collect taxes, duties, imposts and excises", was adopted.

Thereafter it was proposed that the following be added thereto: "For the payment of said debts and the necessary defence and general welfare." The proposal was disapproved by a vote of ten to one. This left the clause, giving Congress unlimited power of taxation, as reported in the original draft. But the giving of an unlimited grant of power seems to have been unsatisfactory, because thereafter another committee reported that the clause respecting taxation should read as follows: "The legislature shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States." This report was unanimously approved. See Story, *Commentaries on the Constitution* (5th ed.), vol. I, Secs. 928, 929.

⁵ Madison's "Report on the Virginia Resolutions", Elliot's *Debates*, vol. IV, p. 552.

concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the national councils, as far as regards an application of money"; and that "the only qualification of the generality of the phrase . . . is . . . that the object . . . be general, and not local; its operation extending in fact or by possibility throughout the Union, and not being confined to a particular spot."⁶

Mr. Jefferson in his opinion on the Bank of the United States said:

To lay taxes to provide for the general welfare of the United States, is to lay taxes *for the purpose* of providing for the general welfare. For the laying of taxes is the *power*, and the general welfare the *purpose*, for which the power is to be exercised. Congress are not to lay taxes *ad libitum*, for any purpose they please; but only to pay the debts, or provide for the welfare of the union. In like manner they are not to do any thing they please, to provide for the general welfare; but only to lay taxes for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole instrument to a single phrase, that of instituting a congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would also be a power to do whatever evil they pleased.⁷

In connection with his veto message of May 4, 1822, of "An Act for the Preservation and Repair of the Cumberland Road", President Monroe sent a statement to the House of Representatives which contains an elaborate discussion of the meaning of the phrase, "to pay the debts and provide for the common defence and general welfare." He stated that he was formerly inclined to the view that the power of the federal government to tax and appropriate tax monies was limited by the sixteen specifically enumerated powers which follow the provision giving the power to lay and collect taxes, but on further reflection he had reached the conclusion the power was not so limited. He further expressed the view that the power of the national government to raise and appropriate money was not without limitation, saying:

⁶ *The Works of Alexander Hamilton* (Lodge), vol. IV, pp. 150-154.

⁷ Jefferson's Correspondence 524-25.

Have Congress a right to raise and appropriate the money to any and to every purpose according to their will and pleasure? They certainly have not. The government of the United States is a limited government, instituted for great national purposes, and for those only. Other interests are committed to the States, whose study it is to provide for them. Each government should look to the great and essential purposes for which it was instituted and confine itself to these purposes.⁸

Mr. Joseph Story in his great work on the Constitution concludes that the provision respecting taxation should be construed as if written: "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, *in order* to pay the debts, and *to* provide for the common defence and general welfare of the United States"; that the general welfare clause is not an independent grant of power but a limitation on the taxing power, and that the taxing power is not limited by the sixteen specifically enumerated powers that follow it.⁹ Story refers to the practical construction that had been placed upon Sec. 8 of Art. I by the legislative and administrative branches of the government, saying:

§ 991. In regard to the practice of the government, it has been entirely in conformity to the principles here laid down. Appropriations have never been limited by Congress to cases falling within the specific powers enumerated in the Constitution, whether those powers be construed in their broad or their narrow sense. And in an especial manner appropriations have been made to aid internal improvements of various sorts, in our roads, our navigation, our streams, and other objects of a national character and importance. In some cases, not silently, but upon discussion, Congress has gone the length of making appropriations to aid destitute foreigners and cities laboring under severe calamities; as in the relief of the St. Domingo refugees, in 1794, and the citizens of Venezuela, who suffered from an earthquake in 1812. An illustration equally forcible of a domestic character, is in the bounty given in the cod-fisheries, which was strenuously resisted on constitutional grounds in 1792, but which still maintains its place in the statute book of the United States.

To the last quotation from Story there may be appropriately added the following expression of the Supreme Court in *Massachusetts v. Mellon*, 262 U. S. 447, 487:

It is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention, although, since

⁸ *Messages and Papers of the Presidents* (Richardson), vol. II, pp. 162-167.

⁹ Story, *op. cit.*, vol. I, Secs. 905-991.

the formation of the government, as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect.

This long unchallenged practical construction by the legislative and executive branches of the government is entitled to great weight.¹⁰

It is my view that the general welfare clause is not an independent grant of power, but solely a limitation on the taxing power—a measure of the purpose for which taxes may be levied and collected: and that the power to lay and collect taxes and appropriate tax monies is not limited by the sixteen specifically enumerated powers that follow it.

But since the function of the general welfare clause is solely to limit, it grants no power and when taxes have been levied and collected and the money appropriated, the taxing power is exhausted. Therefore, the Congress may not enact legislation to promote the general welfare, except within the compass of the powers granted expressly, or by necessary implication by the provisions of Sec. 8 of Art. I, which follow the provision giving the power to lay and collect taxes. Congress may only lay and collect taxes, and appropriate the monies raised to provide for the general welfare. It may not, in addition to laying and collecting a tax and appropriating the monies raised to provide for the general welfare, authorize or direct action to promote the general welfare by a federal agency or instrumentality which would encroach on the reserved powers of the states. And if to promote the general welfare, the tax monies are to be expended in a non-federal activity, or for a non-federal purpose, a state agency or instrumentality, not a federal one, must carry out the activity or effectuate the purpose.¹¹

¹⁰ *McGrain v. Daugherty*, 273 U. S. 135, 174; *Wheeler Lumber Bridge & Supply Co. of Des Moines v. United States*, 281 U. S. 572, 576; *Smiley v. Holm*, 285 U. S. 355, 369; *Missouri Utilities Co. v. City of California*, 8 F. Supp. 454, 461.

¹¹ In *Gibbons v. Ogden*, 9 Wheat, 1, 199, the Supreme Court said:

"Congress is authorized to lay and collect taxes, &c., to pay the debts, and provide for the common defence and general welfare of the United States. . . . Congress is not empowered to tax for those purposes which are within the exclusive province of the States."

I conclude that the general welfare clause does not authorize the Congress to enact social legislation. If this conclusion is sound, then there is no express grant of power in the Constitution giving the Congress power to enact social legislation and it must be found in the powers that are incidental to those expressly granted.

To what extent does the power "To regulate Commerce . . . among the several states" authorize social legislation? It is now settled that under the power to regulate interstate commerce, Congress may regulate not only interstate transactions, but also intrastate transactions which directly affect interstate commerce. But the effect of the intrastate transaction must be direct, not merely indirect; otherwise, as said by the Supreme Court in the *Schechter* case, "there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government."¹² And in the *Schechter* case the Supreme Court held that the Congress has no power under the commerce clause to regulate the hours and wages of persons employed in slaughtering and selling poultry in local trade.¹³

¹² *Schechter Corporation v. U. S.*, 295 U. S. 495, 548, and cases there cited.

¹³ Answering the contention that the commerce clause should be deemed to extend to the establishment of rules to govern wages and hours in intrastate trade and industry generally throughout the country, thus overruling the authority of the states to deal with domestic problems arising from labor conditions in their internal commerce, the Court said: "It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it. Our growth and development have called for wide use of the commerce power of the federal government in its control over the expanded activities of interstate commerce, and in protecting that commerce from burdens, interferences, and conspiracies to restrain and monopolize it. But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. The same answer must be made to the contention that is based upon the serious economic situation which led to the passage of the Recovery Act,—the fall in prices, the decline in wages and employment, and the curtailment of the market for commodities. Stress is laid upon the great importance of maintaining wage distributions which would provide the necessary stimulus in starting 'the cumulative forces making for expanding commercial activity'. Without in any way disparaging this motive, it is enough to say that the recuperative efforts of the

In the Railroad Pension case,¹⁴ the Court held: that the Congress could not take the property or money of one interstate carrier and transfer it to another, whether the object be to build up the transferee or pension its employees: that providing for the satisfactory retirement of aged employees and for the payment of a pension or annuity to such employees on retirement, increasing employment opportunity, making advancement more rapid, and relieving unemployment, have no reasonable relation to interstate commerce; and that the power of Congress to regulate interstate commerce could not be extended to regulations related merely to the social welfare of the worker upon the theory that by engendering contentment and a sense of personal security, more efficient service would be induced.

I conclude therefore, that the Congress may regulate only interstate transactions and intrastate transactions which directly affect interstate commerce; and that while it may regulate the hours of labor of interstate employees,¹⁵ provide for their safety,¹⁶ provide for the amicable settlement of disputes between interstate employers and employees,¹⁷ and otherwise promote efficiency, economy and safety in interstate transportation, and protect it from injury,¹⁸ it may not adopt purely social regulations which have no reasonable relation to interstate commerce, nor to the attainment of those ends.

Other than the commerce clause, I find no provision in Sec. 8 of Art. I, which empowers Congress expressly or by necessary implication to enact social legislation.

federal government must be made in a manner consistent with the authority granted by the Constitution.

We are of the opinion that the attempt through the provisions of the Code to fix the hours and wages of employees of defendants in their intrastate business was not a valid exercise of federal power."

¹⁴ *Railroad Retirement Board v. Alton Railroad*, 295 U. S. 330.

¹⁵ *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612.

¹⁶ *Southern Railway Co. v. U. S.*, 222 U. S. 20; *Texas & P. Ry. Co. v. Rigsby*, 241 U. S. 33.

¹⁷ *Texas & New Orleans R. R. Co. v. Brotherhood of Ry. & Steamship Clerks*, 281 U. S. 548.

¹⁸ *Schechter Corp. v. U. S.*, 295 U. S. 495, 544; *Second Employers Liability Cases*, 223 U. S. 1, 47.

It would seem, therefore, that with respect to social legislation, Congress is limited to the power to lay and collect taxes and appropriate tax monies to provide for the general welfare and the power to adopt regulations directly related to interstate commerce that will promote safety, efficiency and economy in interstate transportation and protect it from injury; and that it may not enact social legislation which has no reasonable relation to interstate commerce, nor to the attainment of those ends.

REMARKS BY THE CHAIRMAN

HON. WILLIAM L. RANSOM: The next and the last speaker of our formal program, before the discussion, will be the Attorney General of Ohio, the Honorable John W. Bricker, whose subject will be, "Shall the Powers of the Supreme Court be Abridged?" The Academy strives always to present a national and not a sectional view. Mr. Bricker is one of the leaders of the bar of his state, a public official who has served with distinction. His vision of constitutional questions is practical and comes from experience in public administration in a great state. It is a pleasure to welcome him to New York and present him to this audience, under the auspices of the Academy. Attorney General Bricker! (Applause)

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SHALL THE POWERS OF THE SUPREME COURT BE ABRIDGED?

HON. JOHN W. BRICKER
Attorney General of Ohio

EVERY public official is faced with various duties. For the purpose of this discussion, I would like to roughly group them:

1. Doing the daily business that comes to the desk.
2. Keeping alive a party organization through legitimate patronage.
3. The application to those tasks of a fundamental philosophy of government.

The first responsibility is easily assumed by one who is reasonably able, diligent and honest. I shall not discuss it. The second is a necessary incident of public office in a representative system of government. The third duty requires a thoroughgoing knowledge of government and an appreciation of the purpose of our institutions; an understanding of the relationship of fact and theory. It requires courage also to build hour by hour with the material of detailed tasks, according to principle.

The attorney general of one of the sovereign states is the state's lawyer. The office in Ohio was established in 1846, some 43 years after the state was admitted to the Union. Then public law questions and public litigation were relatively unimportant. Today the volumes of state reports give more space to public law cases than to private litigation. The determination of questions involving the various activities and powers of these subdivisions of government, of boards, bureaus, commissions and public officials, are today taking and will tomorrow take more and more time in our courts. I noted in the recent judicial survey that the volume of litigation in the federal courts is larger today than ever—that private litigation is becoming less and less as the years pass, the great increase involving government as such.

In all of this litigation within the states, the attorney general is charged with the representation of the public side. In the expansion of government, the duties of the attorney general have been confused with those of the administrative boards, he sitting as a member of many of them and exercising executive and judicial authority. The attorney general has no judicial power but is called upon to pass upon the constitutionality of laws proposed, upon the request of the legislature before enactment, or upon the request of the governor before signing.

No public official is so constantly in touch with the court of last resort of the state as is the attorney general. Oftentimes he is in the position of representing both sides of a litigated matter and once, at least, during my term there has been litigation in our Supreme Court wherein three diverse interests were involved—all of them represented by special counsel appointed by the attorney general. Procedure in our state in some instances permits an appeal from one administrative board to another and from that board to the courts. Often such litigation involves the interests of two or more of the state public authorities. In those contacts the attorney general is constantly called upon to defend and uphold the legislative authority of the state in the exercise of its power. He defends the legislation enacted or the authority exercised by the responsible administrative board. The attorney general also represents in court the chief executive and subordinate state officers in their official duties.

The expansion or limitation of the power of the court is a matter of peculiar official and individual concern to an attorney general.

In the discussion of this question I am attempting to be as practical as possible. I am leaving to others the academic discussion of the theory of checks and balances, necessary to the preservation of the republican system of government. I want to discuss my daily tasks and attempt to apply a rather fixed and fundamental philosophy of government. I have convinced myself, at least, that I do not hold a biased opinion or narrow prejudice. I believe the courts, federal and state, and the interrelationship of the jurisdiction exercised by those courts, are real contributions that America has given to practical democracy.

In 1912 a Constitutional Convention in Ohio submitted to the electorate various proposals for the amendment of the state Constitution. One of those amendments included, among other provisions, the following:

. . . Whenever the Judges of the Supreme Court shall be equally divided in opinion as to the merits of any case before them and are unable, for that reason, to agree upon a judgment, that fact shall be entered upon the record and such entry shall be held to constitute an affirmance of the judgment of the Court below. *No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void.* In cases of public or great general interest the supreme court may, within such limitation of time as may be prescribed by law, direct any court of appeals to certify its record to the supreme court, and may review, and affirm, modify or reverse the judgment of the court of appeals. . . . (Section 2, Article IV, of the Constitution of Ohio.)

Section 6, Article IV of the Constitution of Ohio, dealing with the Courts of Appeals of the State, reads as follows:

The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in the trial of chancery cases, and, to review, affirm, modify, or reverse the judgments of the courts of common pleas, superior courts and other courts of record within the district as may be provided by law, and judgments of the courts of appeals shall be final in all cases, except cases involving questions arising under the constitution of the United States or of this state, cases of felony, cases of which it has original jurisdiction, and cases of public or great general interest in which the supreme court may direct any court of appeals to certify its record to that court. *No judgment of a court of common pleas, a superior court or other court of record shall be reversed except by the concurrence of all the judges of the court of appeals on the weight of the evidence, and by a majority of such court of appeals upon other questions; and whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.* The decisions in all cases in the supreme court shall be reported, together with the reasons therefor, and laws may be passed providing for the reporting of cases in the courts of appeals. The chief justice of the supreme court of the state shall determine the disability or disqualification of any judge of the courts of appeals and he may assign any judge of the courts of appeals to any county to hold court.

In 1928 the City of Columbus and the Board of Education of the City School District of Columbus became involved in litigation concerning the constitutionality of the statute which provided that no charge for water should be made by a city or village or by the water works department thereof, for use of public school buildings in such city or village. The case was certified to the Supreme Court by the Court of Appeals of Franklin County, Ohio. Previously in 1925, a controversy identical with this one had arisen in Cleveland and had come to the Supreme Court of the state from the Court of Appeals of that district. The personnel of the Supreme Court of the state was unchanged from 1925 to 1928. The decision in the Cleveland case was rendered by two members of the Supreme Court of Ohio with five dissenting votes. That was made possible by the above provision in the Constitution of Ohio, and two judges of the Supreme Court were able to render a judgment holding constitutional a law which had been determined by the Court of Appeals to be constitutional. The Cleveland Court of Appeals had held the controverted section to be constitutional. A subsequent case was brought by the Cleveland authorities in another appellate district attempting to get a more favorable decision. They were unable to do so and the same two judges as in the other reported case held the law to be constitutional. These decisions settled the law of Ohio for those two appellate judicial districts.

Columbus, Franklin County, is located in another — the second appellate district. An identical action was brought in the Court of Appeals in the second district and the court, believing that the five judges of the Supreme Court were right, rather than the two, held the law to be unconstitutional. In the decision of the Court of Appeals, the following significant language is used:

In the very nature of superior and inferior courts, the latter should follow adjudicated cases by the higher court when the judgment of the higher court rests upon the concurrence of a majority of the judges, but we are of opinion that where the judgment of the Supreme Court rests upon the concurrence of less than a majority that such judgment is binding only in that particular case as an adjudication, but is not binding in other cases under the rule of *stare decisis*.

Upon appeal to the Supreme Court, five judges, or a majority, sustained the judgment of the Court of Appeals of Frank-

lin County making the law of that judicial district the direct opposite of that of the other two appellate districts, in which this question had been raised and decided. The anomalous and deplorable situation is that in the second appellate district, Section 3963 of the General Code of Ohio is null and void and must be so treated in that district, while in the eighth and ninth districts, the section is valid and must be so treated. In the other six judicial districts of the state there is confusion. Whatever the courts of appeals of those districts should decide would be sustained by the Supreme Court, were the individual members divided today as in 1925 and 1928.

It was necessary for the Attorney General of Ohio, in 1929, to advise the Bureau of Inspection and Supervision of Public Offices that in the second appellate district, Section 3963 is unconstitutional and void; in the eighth and ninth appellate districts, Section 3963 is constitutional and valid; and in the first, third, fourth, fifth, sixth and seventh appellate districts it should be treated as valid until attacked and declared otherwise.

And so we find that that court, rather than making uniform the law of the state by virtue of restriction upon its powers, actually confuses the law. By the doctrine laid down in *Hertz vs. Woodman*, 218 U. S. 205, there is no relief that can be afforded in the federal courts. Under the amendment there have been a few other experiences in Ohio that throw some light upon the effect of restrictions on the authority or jurisdiction of a court of last resort. A statute had been enacted providing that expenses of general elections, including municipal elections, should be paid out of the general fund of the county. On an appeal from the decision of the Court of Appeals, holding the law to be constitutional, three judges of the Supreme Court sustained the law, while four judges of that court believed it to be unconstitutional.

Again the constitutionality of the law providing for fixing a compensation claim with 50% penalty by the Industrial Commission against a non-complying employer, was held to be constitutional, by two judges of the Supreme Court of the state. Five judges believed it to be unconstitutional and dissented. The statute stood. This decision of the two judges of the Supreme Court was later modified by the Court of Appeals of the first appellate district of Ohio, holding that the 50%

penalty was unconstitutional and void, which of course permitted a majority of the Supreme Court to sustain the holding.

In another case involving Section 13668 of the General Code, providing procedure for taking depositions in the trial of a criminal case, six judges held that the law was unconstitutional. In that case, one judge who did not concur in the opinion and another who actually dissented therefrom, concurred in declaring the statute unconstitutional and laid the foundation for a judgment of reversal by four of the seven members of the Supreme Court. This concession was made to avoid the confusing situation possible under Section 2, Article IV, of the Constitution above noted.

In another case the judge who wrote the opinion of the court, holding constitutional a statute, was personally of the opinion that the law was unconstitutional. In his opinion we note the following language: "However, since there are not five of my associates who concur with me in this view, the act as enacted cannot be declared unconstitutional, and therefore must be recognized by me, as by all other persons, as an enforceable act of the legislature."

The Legislature of Ohio provided for the payment of the claims of employees of insolvent employers out of state insurance funds. Three judges of the Supreme Court of the state held that law to be constitutional, while four were of the opinion it was unconstitutional. The law stood.

Fullwood vs. City of Canton (116 Ohio State, page 732) involved the constitutionality of a municipal ordinance for examining and licensing electricians. The Court of Appeals had held the ordinance to be constitutional. Two judges of the Supreme Court of Ohio on error held that the ordinance did not violate any of the limitations of the Constitution of Ohio. Five members of the Supreme Court believed that the ordinance did violate the Constitution of Ohio in that it did not operate equally upon all members of a given class and that the ordinance improperly limited freedom of contract. Three of the members of the court, however, were of the opinion that the provisions of Section 2, Article IV, requiring concurrence of all but one to declare a law null and void, applied to ordinances of municipalities. Four members of the Supreme Court, including the two that believed this ordinance did not violate the Constitution of Ohio, held that an ordinance of a

municipality is not a law within the meaning of Section 2, Article IV; but two of those four judges, being the two who believed the ordinance to be constitutional, could not consistently join in a judgment of reversal. In effect, the situation was that there was not more than one member of the court holding the ordinance to be constitutional and there not being as many as four members of the Supreme Court who held that the ordinance is not a law, who, at the same time, concurred in a judgment of reversal, it followed that there was an insufficient number of judges in the Supreme Court of Ohio concurring on the points of law necessary to a reversal and the judgment of the Court of Appeals was therefore affirmed.

The City of Cincinnati had prohibited the auction of jewelry by ordinances. It came to the Supreme Court, under the claim of violating the Bill of Rights both in the United States Constitution and in the Ohio Constitution. Three judges believed the ordinance constitutional. Four judges believed the ordinance unconstitutional. Three judges thought that Section 2, Article IV, above, applied to municipal ordinances. There was therefore more than one member of the court holding the ordinance constitutional and there were not as many as four members of the court holding that an ordinance is not a law, who at the same time concurred in a judgment of reversal, so that there was an insufficient number of judges concurring upon the points of law for a reversal. The judgment of the Court of Appeals stood.

In an original action involving the salary law of judges in Ohio, three members of the Supreme Court held the law to be constitutional. Four were of the opinion that it was unconstitutional.

The sanitary district act of Ohio, providing for the creation, by counties, of sanitary districts, was held to be constitutional by a minority of the court. A majority felt it was in conflict with home rule provisions of the state Constitution.

The park district act of Ohio was held to be constitutional by two judges of the Supreme Court of the State, the question in that case being whether there was a delegation of legislative power to administrative bodies.

No doubt, it was intended by the amendment as approved to strengthen the legislative branch of the government and weaken the judicial. It has taken from the Supreme Court of the state

some of its authority to decide constitutional questions by a majority vote. It has increased the power of the Courts of Appeals in constitutional questions.

The absurd conclusion has been reached that the intermediate courts have greater power in some respects in constitutional questions than does the court of last resort. The Supreme Court of our state has significantly said this of the above amendment:

This amendment to the Ohio Constitution is without a parallel in any state in the Union, and is violative of the basic principle of popular government, which must always rest upon the loyal acceptance of majority rule. In a few matters of superimportance, it is required in legislative bodies that a conclusion can only be reached by a two-thirds majority, and in some instances a three-fourths majority is required. In no other instance in any of the three branches of government is it provided that a conclusion can be reached by less than a majority. The effect of this constitutional amendment is to give greater force and effect to the opinion of two members of the court than to the other five.

I believe that I can say confidently from personal experience and from expressed opinions of judges of other courts of the state, as well as from other states and from our leading members of the bar, that the limitation placed upon the Supreme Court has resulted only in confusion and in ridiculous situations. It has not strengthened the personnel of the court or given greater weight to its opinions. It has merely mixed up the rules of procedure. I doubt if you could find one person who has studied the government of Ohio who would contend that it has strengthened the legislative branch of our government, raised the standard of membership of the legislature or given better quality to the product of the legislature.

I recognize that there are many confusing clauses in the constitutions of the various states of the Union. There has been written into them much sumptuary legislation that should be left to the legislatures, but the states are the proper sphere within which experimentation should be carried on in matters of government. That might be true of constitutional law as well as statutory law. It is my hope that the experience of Ohio, limiting authority of the court of last resort in declaring unconstitutional acts of the legislature, might be a help, even a warning, against any movement to weaken the authority of the courts of last resort of the other states of the Union or of the Supreme Court of the United States.

North Dakota has had a somewhat similar, but not so confusing and absurd an experience as Ohio. Two or three other western states have not had favorable experiences with such provisions.

It is impossible to find the source of a great current of political development, but to John Adams as President, great and lasting credit should be given. He offered the high office of Chief Justice to John Jay. Mr. Jay declined the appointment because he believed the Supreme Court was fatally lacking in power. John Rutledge gave up an associate justiceship to become Chief Justice of the Supreme Court of South Carolina. Patrick Henry refused an appointment. Today, chief justices and judges of State Supreme Courts, as well as governors and United States senators grasp the opportunity for service on the Federal Circuit and District benches. Upon John Jay's refusal, John Marshall was appointed. Senate opposition developed because Marshall had never been a judge. Adams with seeming prophetic vision knew John Marshall. Another great Chief Justice, Charles E. Hughes, was opposed in the Senate, because of supposed personal views on great economic questions. It has been a long and steady journey from John Jay and a powerless Supreme Court to Chief Justice Charles E. Hughes and a powerful Supreme Court—holding Congress and the President in the paths of constitutional procedure and power.

The cry of "curb the courts" only is heard in time of economic stress. The Constitution was drafted in time of chaos—contracts were unenforceable—Congress could do little more than run the post office. There was no stable currency. Out of this disorder the Constitution brought order, respect for authority, a stable currency, orderly government.

In that transformation, Chief Justice John Marshall and the Supreme Court guided the way. The structure of our government is builded around the framework of the Constitution. When storms and earthquakes come, the framework holds the building from collapse. So in troubled times of social and economic upheaval the Constitution has held our government intact and on a steady course.

Without the Supreme Court and its power to hold legislature and executive within constitutional bounds, the Constitution is on a par with the acts of Congress. It might be that we could

trust the legislative branch to preserve the Constitution and its provisions, but even so the system would be changed.

The more volatile branch, the legislative, has been prompted by expediency, has maybe held too lightly its oath, has passed legislation, regardless of doubtful constitutionality. The Supreme Court has never yet abdicated or been swerved from its constitutional course.

Shall the power of the great court be curbed?

Should the lower courts also be restricted?

Should the authority of federal courts to declare unconstitutional state laws be also curbed?

Should state courts be curbed also in passing upon the constitutionality of state laws under state and federal constitutions?

Should state courts be limited in passing upon constitutionality of federal laws?

The asking of these questions proves that any curbing of power on the part of the courts or any court would amount to a change of our system of government. It would weaken the constitutional structure. It would result in utter judicial confusion, curbing progress. It would place the country at the mercy of legislative experimentation. Checks of such power are necessary, if liberty be preserved.

Supreme legislative power places in the hands of groups and organized classes influence beyond their numbers. It sets group against group, class against class, section against section. Such a tendency is supported by the symbolic thinking today. We read in headlines. We see kaleidoscopically. Those whom we oppose are in our thinking and speech, liberals, radicals, communists, Tories, reactionaries, conservatives. The term is used that carries the greatest opprobrium.

Such thinking and such unbridled legislation lead in purposeless direction—authority breaks away in all directions at once. The result of such confusion is a man on horseback bringing to a common course all these diverse elements. Power and might, under a ruthless dictator, do what reason and calm judgment should have done.

Europe is today a living proof of such a course. We have caught the backwash of a lot of foreign government policy, but in the past year, in the central West at least, we have awakened to the fact that, in the world, democracy is at stake.

Liberty is imperiled and human rights are trampled under the ruthless heel of might. The danger has been brought vividly to us by the blood purge in Germany, the ruthless conquests of Italy and Japan, the failure of the Communist experiment. With all of these have come human woe, suffering, destruction, disease and death.

During this time, here in America democracy has moved on and upward. We have taken care of our own. Our daily necessities are the luxuries of the people of most nations. All along the road of our progress have been signs pointing the way. These have been decisions of the Supreme Court.

I live in the fertile valley of the Scioto River. A great natural calamity once spread desolation over that fair valley. It may have destroyed a proud civilization. When the ice receded, a fair land bloomed again and a greater civilization arose. In the far sight of time the blight became a blessing. Only those who do not know the determination to live better, who do not appreciate the discouragement endured and obstacles overcome, lose hope. This trying time may test the institutions of democracy, may strengthen the guarantees of freedom and liberty in the Constitution. It may direct our constructive efforts to the defects. If this is so, it is only another proof of our inherent genius and power to govern ourselves. I believe the Anglo-Saxon ideal of self-government and of liberty under law is imperishable.

With crisis after crisis, and assault upon assault, we see individual liberty still safeguarded by the Constitution, a constitution triumphant and yielding only in the application of its fundamental concepts. Not only has the Constitution withstood adversity, but great prosperity, industrial expansion and economic change.

Today the Supreme Court is in the midst of an evolving jurisprudence. It hears neither the clamor of the mob nor the threats of power. It is unswerved by the masses and undaunted by fear. Criticized and glorified—it has the abiding confidence of the American people.

It was in the historic and now sacred old court room on the 25th day of last March that the three memorable decisions were handed down. One protected the legislative branch of the government against the illegal domination of the executive. A second preserved the credit of agricultural America and

again placed honest contracts beyond the power of organized government. Finally, the decision in the *N. R. A.* case called Congress and the executive back to the charts and plans. The import of that decision was beyond the complete conception of the lawyers there that day. It was not so with the American people. A feeling of satisfaction and approval spread over the land. Even the disapproving words of a powerful and popular executive could not disturb that feeling of approval and abiding confidence in the integrity of the Court from which there is no appeal. With that decision America determined to go ahead. The constitutional guarantees still stood and the checks were being applied to unbridled power. That popular approval of a landmark decision not only proves any limitation of the power of the Supreme Court unnecessary and not desirable, but also impossible of accomplishment. Since the *Schechter* decision there has been an abatement of any demand for either enlarging the membership of the Supreme Court or curbing its power.

The subject which I have been asked to discuss implies an assault upon the power of the Court. This outstanding and fundamental question is agitated by attack and defense; it involves the judicial interpretation of the Constitution, the judicial protection of private rights against even the agencies of government and the defense of the minorities or the individual against the unguarded will of the majority.

That power is America's peculiar and crowning gift to the science of politics. It is our most helpful effort in the unfolding jurisprudence of all times. It is necessary to preserve the Constitution that the Court measure legislative and executive power by the Constitution. This is not subordination of the legislative and executive to the will of the judicial branch of the government, but is subjecting them to the will of the people, expressed in a written constitution.

The claim of usurpation has been raised. Even though Franklin once casually said he opposed the power of the Supreme Court—it was assumed and generally expressed in the Convention that such power would exist. There was of course colonial precedent for the power of the Court to restrict legislative authority. This interpretation was accepted in the states in the debates on ratification. John Marshall so answered

Patrick Henry. It was proclaimed everywhere by the *Federalist* and at the earliest opportunity judicially decided.

The Constitution is not to be worshipped—it is a human document, drafted to work. It is not outmoded. It lives and must be lived. It has changed and will be changed. It is responsive to the cool will of the majority under its own terms. We note the twenty-first amendment.

The law, both fundamental and legislative, must grow with the country. The fundamental conceptions of order, ownership and liberty must continually be applied in the light of conditions and an expanding jurisprudence. Listen to the words of a great liberal, the founder of the Democratic party's traditional concept of government, Thomas Jefferson: "The real friends of the Constitution in its federal form, if they wish it to be immortal, should be attentive, by amendments, to make it keep pace with the advance of the age in science and experience."

We may change the Constitution and likely will, but such a change must not carry with it a weakening of the position of the Supreme Court. That would nullify the meaning of the change itself and make it temporary and perhaps unenforceable.

Under the Constitution, government and liberty have been as practically reconciled as ever in human experience. That reconciliation and that happy coördination can continue only if we properly distinguish between legislation and fundamental law. We should cease writing police regulations and sumptuary legislation into our constitutions—state and federal, or the distinction of fundamental law will be annulled.

For three years I have had the responsibility of representing what I have considered one of the sovereign states of the Union. From the days of Jefferson and Hamilton there has been a constant trend toward Hamiltonian theories of government, a constant expansion of federal authority to the weakening of the power of the states. But that transition from the state to the federal government has been orderly and, under the guidance of the Supreme Court, consistent with a developing country. It has been an unbroken molding of the past into the present and an application, without clash, of the teachings of experience to the problems that arise day by day. To be orderly, to bring progress, any change must be without too great a clash with the ideals, concepts and history of the past.

As Attorney General of Ohio, I have met reversal in attempting, as I believed, to protect the sovereignty of the state against encroachment by the federal government. I approached the Supreme Court, but did not get in on the question of the power of the federal government to tax the state liquor monopoly in Ohio.

I have seen the trend in banking and building and loans. Liquidation of insurance companies, even though exclusively by law of Ohio within the power of the state, has come under the jurisdiction of the federal courts. But even this has been orderly and I, as a representative of one of the sovereign states of the Union, will trust in time of crisis the guidance of the Supreme Court of the United States, sworn to protect the Constitution, preserving the federal relationship, more than I would the legislative branch of the federal government, supreme in its power, swayed as it might more likely be by a clamoring minority, by selfish power or by majorities, swept by the passing passion of the hour and the seeming emergencies of the day.

America has been builded upon validity of contracts and faithfulness of trustees.

After Congress enacted N. R. A., Ohio, under the sway of the then majority party, enacted an Ohio Recovery Act applying to intrastate commerce the N. R. A. as that applied to interstate commerce. The administrative representatives, charged with the administration of N. R. A., demanded that they be empowered by Ohio to administer our law. The basis of the contention was that the government of Ohio, under the Constitution, could not abrogate contracts and the federal government could. Ohio proceeded to administer her own law. Should not experience therefore lead me more to trust the guiding hand of the Supreme Court than the power of the legislative and executive branches at Washington?

I heard the decision of the Supreme Court of the United States in the *Blaisdell* case. Ohio had a similar statute then in litigation in our own state. We had joined in the case and filed briefs defending the constitutionality of the mortgage moratorium act of Ohio. Around the old room seemed to linger the spirit of Webster, Clay and Calhoun, as they approached the day which was to so dreadfully test the constitutional system. There seemed to hover about also the guiding spirit of Chief Justice John Marshall as the Court so clearly

made its way through the labyrinth of conflicting principles of law. There were about fifteen states represented by their attorneys general that afternoon in the Court and they were privileged to hear the Court working out the intricate relationships of their states and the federal union and adjusting them both to the constitutional plan.

In Minnesota there had been a general economic collapse in the rural communities particularly. Tax delinquencies had reached as high as seventy-five per cent in some counties. There had been penny sales, foreclosures were numerous, farmers were losing their farms and home owners their homes. Prices were low, breaches of the peace had occurred, there had been riots and even bloodshed. Upon these facts the state of Minnesota, in its sovereign right, had declared an emergency to exist and in the protection of the public peace, health and safety, had enacted a law providing for a moratorium on mortgage foreclosures on homes and farms.

Blaisdell was before the Court of last resort asking the benefits of that law. Its constitutionality was being attacked by the mortgage company which claimed it violated the contract and due process clauses of the federal Constitution. The Chief Justice delivered the opinion for himself and four Associate Justices. We heard the Chief Justice say in this case:

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power, granted or reserved.

The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the states were determined in the light of emergency and they are not altered by emergency.

While emergency does not create power, emergency may furnish the occasion for the exercise of power.

He quoted from Chief Justice John Marshall in *Gordon vs. Saunders*:

The power of changing the relative situation of debtors and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and men.

The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith.

He referred to decisions of the high court in landmark cases: *Sturges vs. Crowninshield*; *Bronson vs. Knisie*; *Goutly's Lessees vs. Ewing*; *Cohens vs. Virginia*. Coming then to the issues of the present case, Chief Justice Hughes said, referring to the contract clause:

Not only is the constitutional provision qualified by the measure of control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interests of the people. It does not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect."

The Court quoted Justice Brewer in *Long Island Water Supply Company v. Brooklyn*:

But into all contracts whether made between states and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore be carried into express stipulation for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, whenever a necessity for their execution shall occur. The Legislature cannot bargain away the public health or public morals.

Again quoting from the opinion:

Legislation to protect the public safety comes within the same category of reserved powers.

This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any right under contract between individuals.

Said the Court—bottoming the decision on the New York Rent Law cases:

It is manifest—from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare.

Then comes the tie-in with the corner stone of constitutional interpretation, *McCullough vs. Maryland*. In that famous case, Chief Justice Marshall said:

We must never forget—it is a constitution we are expounding, a constitution intended to endure for ages to come, and, consequently to be adapted to the various crises of human affairs.

The law was sustained. The Court held tenaciously to the established order—the Constitution, the sacred traditions, following precedent, yet it interpreted and applied them in the light of new conditions, new social demands, which could not have been foreseen by the most gifted begetters.

No sooner had the decision been rendered than confusion broke out in the court room. Lawyers said, "This means the sustaining of the N. R. A., the whole New Deal Program." Another great lawyer said the Court had thrown the Constitution out of the window. Into this confusion broke the voice of a veteran jurist, Justice Sutherland, with a dissent of four Associate Justices. This dissent was the most analytical and critical dissent that I have read except that in the Gold Clause case. I left that court room with a new confidence in our institutions, a new hope for our democracy, a belief in a better tomorrow, both because of the decision and the dissent. I know no majority would withstand such an attack unless inspired and conscious of a grave duty and sure of their course. The majority of that Court would not so firmly have stood its ground had it not realized in its own conscience and good judgment that it was preserving the Constitution with the sacred rights guaranteed therein rather than destroying it.

We left the court room, passed by the halls of Congress—that branch of our government which is swayed by the demands of the day, which listens to the loud and clamorous minority, which feels the power of a majority—we realized that the Congress, volatile, as it is, can be held in constitutional limits by that great Court. In the distance was the White House—symbol of the executive branch of our government. We knew that the President, glorified as he has been in our country's history, could be confined to his constitutional and legal powers by that great Court. Then from the front steps of the Capitol we saw the most beautiful, the most imposing and majestic structure and in the cause of Democracy, the most meaningful,

I believe, in the world—the new home of the Supreme Court of the United States. As I contemplated the scene I had just left, I felt it is more than the new home of the Supreme Court—it is a new “Temple of Liberty”.

Our history proves that the Supreme Court is the last bulwark of defense of the constitutional system. It has been equal to the task. It alone can meet that responsibility in the future. It can only maintain its dignity, its strength, its power to maintain the constitutional system, unhampered and unrestricted in the consideration and decision of the vital questions presented to it.

REMARKS BY THE CHAIRMAN

HON. WILLIAM L. RANSOM: We now reach the stage of discussion. It is the custom at these meetings of the Academy to devote such time as is left to discussion from the floor. The discussion will be opened by one of the Trustees of the Academy, Dean Howard Lee McBain, of the Graduate Faculties and Ruggles Professor of Constitutional Law, of Columbia University. (Applause)

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THE SUPREME COURT AND THE STATES: DISCUSSION

HOWARD LEE MCBAIN

Dean of the Graduate Faculties and Ruggles Professor of
Constitutional Law, Columbia University

AS applied to meetings in which the Constitution of the United States is under consideration, the ten-minute rule of discussion is designed, I think, to guarantee to those who have performed, a freedom of speech that approximates the absolute, and to guarantee to those who have listened, an early exercise of their freedom of disassembly. That is what the founding fathers of such meetings had in mind when they wrote the rule, and I should be derelict in my obligation should I depart from the manifest intention of the plain words which they employed to convey their meaning, the simple and unmisconstruable term "ten minutes". What I shall say, therefore, will be less a comment upon what has been said than just another paper, albeit a constitutionally brief one.

Whatever I may think of specific items in the New Deal program, I agree with Mr. Walter Lippmann that the events of the last six years, beginning under Mr. Hoover in 1929 and continuing under Mr. Roosevelt down to the present day, caused a fundamental, not to say revolutionary, change in the concept of government in America. The national government assumed the responsibility to protect the people against the consequences of depression. Mr. Lippmann says, "It would seem that the decision which Mr. Hoover took in the autumn of 1929 is irreversible: he committed the Government to the new function of using all its powers to regulate the business cycle. With this precedent established, it is almost inconceivable that any of his successors should in another depression refuse to act." And he concludes that "the knowledge that the Government will have to act to offset depression compels it to act to prevent depression. Because Mr. Hoover and Mr. Roosevelt have regulated a slump their successors will have to regulate a boom.

The business cycle has been placed within the orbit of government." There he thinks it will have to remain.

In the end I am reasonably sure that he is right. For the immediate future I am not as certain.

Logic-following is not among the most conspicuous attributes of politics. Entrenched business will unquestionably fight the government's attempt to assert any such responsibility in times of prosperity. They are already fighting it even though prosperity is not much more than a hopeful anticipation.

In my judgment this fight, however long protracted, is obliged to be ultimately lost by business. I hope that it can be lost in a series of skirmishes, by degrees, as it were, rather than in a decisive battle that might end in cataclysm.

Despite the apparent reaction at the moment against national centralization in general and many of the New Deal activities in particular, I believe that the national government must in the future assume a larger responsibility for, which means a larger control over, the national economy than it exerted prior to 1929. There must be a larger exercise of what Mr. Lippmann calls "conscious management by the political state", by which I do not imply and he does not imply all that is commonly scooped together in the loose phrase "planned economy".

But even in the narrow concept I do not believe that the constitutional powers of Congress are adequate to this conscious management. I am convinced that these powers will have to be enlarged though I am well aware that there is no chance whatsoever of enlarging them at the moment. By serious people who have no economic axe to grind, the states' rights issue may be dismissed as inconsequential. There is nothing sacrosanct about states' rights. It is, and always has been, a convenient and useful battle cry for any group whose economic toes are endangered by federal action. Most of these groups have no interest whatever in preserving the fundamental principle of Federalism as such. Some of the powers which the federal government will need, the states are in any case either for practical or constitutional reasons wholly incompetent to exercise.

By and large, our federal system is a good system for us, a good system in spite of the nationalization of our economic life. We should preserve as much of it as we possibly can. We should be slow and thoughtful in giving new powers to the

national government whether or not such powers actually diminish the powers of states or are simply powers which now inhabit a midnight (Mr. Dickinson—not, I think, a “twilight”) zone which neither unit of government may invade.

Mr. Elliott suggests—I might say almost threatens—the taxing and spending powers of Congress as a way of control. I agree with him rather than with Judge Phillips, that the Supreme Court is likely to put a very broad interpretation upon the taxing and spending powers now resident in Congress; in fact, I do not understand the ultimate conclusion to which Judge Phillips led from his apparent suggestion of the doctrine of government by semicolon. I am of the opinion, ladies and gentlemen, that both the A. A. A. and the T. V. A. will be upheld by the Supreme Court. But apart from other objections, I do not believe that the spending power of Congress is sufficient to effectuate the kind and degree of conscious management that will be necessary. Moreover, it is far too manipulatory, far too subject to the known temptations and abuses of democratic ways, to be a satisfactory solution for any length of time.

I am convinced, therefore, that direct amendment of the Constitution enlarging the powers of Congress will be both necessary and desirable. But when? I do not know. Certainly not now. But how? That is a far more important question.

In an article that is caustically critical of the New Deal, by Mr. William Bennett Monroe, in the current issue of the *Atlantic Monthly*, I was amazed to read the following:

“Constitutional reform, accordingly, should have had the first, not the last, place on the New Deal agenda. Two years ago it was just as self-evident as it is today that the existing constitutional powers of the national government are inadequate to the tasks which it is attempting to perform. That situation should have been frankly faced at the outset. In March, 1933, when the country’s morale was at its lowest and Congressional enthusiasm for the New Deal at its highest, a proposal to extend the powers of the national government over the entire domain of commerce and industry would almost certainly have received the necessary two-thirds vote in both houses” and the required state “ratifications within a few months.”

I shudder to think this is probably true. I can only thank a merciful Providence that the Brain Trusters, if they entertained

such a thought, were wise enough not to act upon it. We put Prohibition into the Constitution under war emotions; we took it out under depression emotions. That should be a sufficient lesson. In saying this I am not unmindful of the emergency conditions out of which the Constitution of the United States arose. We cannot revive, we cannot reproduce, the circumstances of that hour. Low popular morale and Congressional panic are not the atmosphere in which constitutional amendments should be drafted and adopted. Had the New Deal proposed a constitutional amendment in the spring of 1933, I have little doubt that at least two thirds of our Federalism would be in the ash heap today. I do not hanker for such an eventuality.

In the present circumstances of our Congress (and I see no hope of raising the level of its capacities or curing its legislative ineptitude) and more especially in the present deplorable state of our administrative personnel (and I see no hope for immediate large improvement in that regard) I dread bureaucratic centralization in Washington. I dread it as a colossal evil. Yet I am confident that forces beyond our control, as they were beyond Mr. Hoover's control in 1929, and Mr. Roosevelt's in 1933, will require the extension of national control as the lesser of alternative imminent evils in our political-economic structure.

Theoretically much can be said against a policy of constantly tinkering with the Constitution. In the presence of realities I prefer tinkering. I would extend the powers of the nation grudgingly, bit by bit, as the need for extension appeared unavoidable. Not for a moment, for instance, would I advocate the sweeping amendment suggested by Mr. Elliott, conferring upon Congress unrestricted power over all commerce, manufactures, agriculture and natural resources. Words are malleable tools of thought. They hide an infinity of unforeseen and unforeseeable implications as the whole history of our constitutional law has disclosed. No amount of caution will make us certain that we are not giving more than we intend, but in this all-important task that lies before us at no distant date, let us strive for such certainty as we can hope to realize. Let us make haste slowly, very slowly. (Applause)

PART II

NATION AND STATE IN ECONOMIC AND SOCIAL PLANNING

INTRODUCTORY REMARKS *

HON. OGDEN L. MILLS, *Presiding*

Former Secretary of the Treasury
Trustee of the Academy of Political Science

THE meeting will please come to order. The topic for discussion this afternoon is "Nation and State in Economic and Social Planning", and the first speaker is Dr. Edwin Griswold Nourse, Director of the Institute of Economics of The Brookings Institution, Washington, D. C., who will discuss "Agricultural Planning". Dr. Nourse!
(Applause)

* Opening the Second Session of the Fifty-fifth Annual Meeting.

AGRICULTURAL PLANNING

E. G. NOURSE

Director, Institute of Economics, The Brookings Institution

THE subject of agricultural planning lends itself to treatment in a series of twenty university lectures or twenty chapters in a book much more readily than to presentation in a twenty-minute address. I shall, however, in the time at my disposal attempt to present a few highlights in the evolution of agricultural planning in the United States. Of necessity my discussion will be reduced to a succession of brief and rather categorical propositions.

The very fact that I have used the phrase, "the evolution of agricultural planning in the United States", reflects my belief that agricultural planning is nothing new in the agricultural field. Indeed it runs back at least seventy-five years—to the time when our land-holding system was modified by the passage of the Homestead Act and a distinctive and democratic scheme of educational guidance for agriculture was launched by the creation of a separate Department of Agriculture in the federal government and the setting up of a system of land grant colleges designed to cover every state in the Union.

These two developments characterize the major aspects of agriculture's economic organization from the 1860's until 1929. On the one hand, freedom of industrial economic enterprise was carried to its greatest possible extreme, with practically free land made available to all who wished to enter the business of farming. On the other hand, a system of popular education for those following the several branches of agriculture was developed with the utmost vigor and originality. Agricultural colleges were in time supplemented by experiment stations and a large and highly specialized extension service. County agricultural agents and farm bureaus, boys' and girls' clubs, Smith-Hughes teaching in the high schools articulated with actual farm work through "home projects", carried the system of educational guidance to or at least very far toward its logical extreme.

Was this a planned economy? I submit that in a sense it was. Given a body of husbandmen of high native intelligence, supplement their natural sagacity by an elaborate and efficient set of agencies for keeping them well informed as to both the productive aspects and the market conditions for their commodities, and they will approach the character of "economic men" in the classic economic sense. By intelligently seeking their individual welfare under the prevailing system of free enterprise, they will collectively approach the optimum result which could be expected of agriculture as a segment of the national economy. This was the sort of planfulness envisaged under the *laissez-faire* system. It might be called automatic planning, synthetic planning, or "planning after the fact." What was done voluntarily but thoughtfully by many unregimented individuals fell into a general pattern which might take on the similitude of an economic plan to those who contemplated it in retrospect.

Whereas the growth of the agricultural extension service gave this type of agricultural economy its characteristic form, the coming of Dr. Henry C. Taylor to the Department of Agriculture in 1919 and, in due time, the erection of a Bureau of Agricultural Economics out of three preëxisting bureaus or offices gave the development new force and direction. The distinctive phase of Taylor's influence was his shaping of the research activities of this revived bureau toward the making of "outlook reports" to be disseminated to farmers widely through the extension services of the respective state agricultural institutions. Outlook reports undertook price analysis in the future tense with specific recommendations to producers of various agricultural commodities as to the scale on which they could most wisely conduct their operations during the ensuing season. All of this was of course purely advisory on the part of government and the use, if any, which was made of the advice was purely voluntary on the part of farmers. It was, however, an active, even aggressive, type of educational work rather than one which was purely passive.

Outside the government also, something of a centralizing agency of economic guidance had been developing from the 90's or even earlier. This was the coöperative movement, purely voluntary and limited in its activities chiefly to distributive rather than productive phases of the farmer's work. To

an extent, however, it did centralize and intensify the study of market demand and promote the use of this information as a guide to productive operations. By transmitting back to the producer the knowledge which the headquarters staff gained as to quality and quantity limitations of consumer demand, the coöperative movement introduced into his business operations a certain planfulness which would otherwise have been absent.

This brings us to 1929, when the Agricultural Marketing Act established a Federal Farm Board. This Board sought to coördinate distributive operations under nation-wide coöperative marketing organizations. Through its ancillary devices of credit extension and carry-over manipulation by stabilization corporations, however, it went considerably farther toward implementing planning than had any of the previous undertakings of the government. In the phraseology of the act itself, it sought not merely to secure "orderly marketing" but also "orderly production." The second and third annual reports of the Board strongly stressed the belief that the objectives of the Federal Farm Board could not be accomplished save as it developed devices or procedures which would in some significant degree control production. Positive measures with reference to land utilization were suggested in the third report but no definite action had resulted up to the time of the Board's sudden demise in the spring of 1933.

The Agricultural Adjustment Act of May 12, 1933 launched the government on a program of implemented planning for agriculture which, although it was based broadly on previous educational and advisory schemes, went far beyond them in making such modifications in our price-making and income-determining machinery as would induce the farmer to pursue a particular program of action. He was assured of pecuniary rewards for following such a national plan. The Bankhead Cotton Act, the Kerr-Smith Tobacco Act and the Warren Potato Act, plus a series of commodity loans, increased the breadth and intensified the force of this implementation.

Owing to lack of time, we must forgo any discussion of the mechanisms of control or the administrative aspects of these new agencies. But let us see whether, by focusing our attention strictly on the economic content of the agricultural adjustment proposals, we can arrive at some clear and adequate notion of the extent and character of economic planning which they

involve. The agricultural adjustment program builds directly upon the old agricultural outlook philosophy. That is, it seeks first to get a picture of the probable power of the market during the following year (and to some extent longer periods) to absorb varying quantities of the several agricultural products within a range of prices slightly above and slightly below those prevailing. Against this demand schedule, it projects as accurate and as realistic as possible a supply schedule, showing estimated quantities of the several agricultural commodities which, in view of probable weather conditions, agricultural labor supply, available credit, and farmers' response to present or immediately previous price influences, might be expected under various adjustments of producers' incomes. On this information the Agricultural Adjustment Administration proceeds to set a production quota. It makes a specific production program for most of the major agricultural products.

This new implement for carrying planning directly into effect has been drawn down to its cutting edge through the decentralizing process of having national proposals subject to check by state and local bodies representative of producers. Through public hearings and committee participation in the formulation of the several commodity programs, this scheme of planning seeks to strike a practically effective balance between the desirable generalization of nationally centralized agencies for the study of larger economic forces and locally particularized issues of soil and weather, available equipment, mental character of the workers, and the like.

The vital center of the whole issue raised by the Agricultural Adjustment Act is whether maximum benefit in terms of rational economic activity would come from the continuation and refinement of the old system of purely voluntary, democratic, but more or less coördinated, advisory planning, or whether, not content with the rapidity and skill with which adjustments were made through such a system, we should give it new and positive implementation in the form of economic rewards and sanctions. It is along this line that we have been experimenting during the past three years under the name of rental and benefit payments, processing taxes, compensatory taxes, ginning taxes and the like.

The essence of this new departure may be stated rather briefly. On top of the old planning based on economic analysis

buttressed by an elaborate statistical methodology, there is superimposed a scheme of modified income distribution and price motivation in which funds partly drawn from consumers, partly from processors, partly from the public treasury, and partly withheld from the initial prices paid producers themselves are distributed to those farmers who comply with a definite program of adjusting their productive operations in accordance with schedules promulgated by the central government although, as we have said, formulated in ways which involve participation on the part of farmers and their local educational representatives.

This brings us to the politico-economic problem which is most clearly related to the general theme of this meeting of the Academy. Can these proposals for putting more power and definiteness into agricultural planning be carried out within the limits of our Constitution? In order to get a convenient working formula for the adjustment agency and even more, I suspect, to get a persuasive phrase for purposes of public discussion and Congressional debate, the goal of economic planning under the Adjustment Act was set as pre-war "parity", either of agricultural prices or farmers' incomes (both ideas appeared in the Act). In practice, however, the Adjustment Administration has not permitted what it considered sound and far-sighted policy for the adjustment of agricultural industry to be stultified by the formal limitations of the objectives so stated. It has conceived its task much more broadly as one of promoting reasonable conservation of our natural resources and a dependable supply of the whole range of agricultural commodities on as liberal a basis as is compatible with the going rate of return on capital invested in agriculture and a labor return for farmers comparable with the wage levels found in industry.

It seems clear that a really sound type of economic planning for agriculture cannot be developed under strict adherence to the "parity price" formula. On the other hand, it is doubtful whether the Supreme Court will regard anything less definite and specific than such a formula as a proper delegation of legislative authority. The Adjustment Administration is thus confronted with the dilemma of somewhat compromising the economic character of its planning or of running the risk of acting outside the terms of its mandate.

A great many people are convinced that this experiment in agricultural planning is good. Many of them find that it advances their individual economic fortunes. Many other people express themselves as convinced that the thing is utterly pernicious. Many of them suffer more or less pecuniary loss from its operation. Most members of both groups show upon a little questioning that, in spite of their positiveness that the device is either good or bad, they are very far from knowing what it *is*. Having myself been privileged to administer a fund of considerably over \$100,000, which has been devoted to the concurrent study of this experiment since June 1933, I am daily impressed with the magnitude of the task of really finding out just what results these new procedures bring about within the whole frame of our national economy. I shall, however, permit myself five generalizations which at the present stage of my study appear to me tenable:

(1) In a small-scale industry such as agriculture, with the educational system which it had developed, the direction of economic enterprise was already on a reasonably high level of efficiency.

(2) This system of economic guidance could not operate with sufficient flexibility and speed to accomplish the adjustments called for by the disruptions of world trade and industry in the World War and the sweeping changes in agricultural technique which hit the farmer simultaneously and were capped by the industrial and financial breakdown which followed 1929. There is thus furnished an emergency justification for experimentation of rather extreme type.

(3) It seems probable that the operation of economic planning under the Adjustment Act over the period of a few years that it has been conducted has made a permanent increase in the effectiveness that the agencies for voluntary guidance of agriculture would have in the future.

(4) Certainly before the Supreme Court has passed on the constitutionality of AAA cases now pending and probably even after that time, it will be far from clear whether authorization for carrying on planning activities of a sort which are economically sound can be reduced to a sufficiently definite set of propositions so that they can be embodied by Congress in a legislative act which will constitute a proper delegation of legislative authority conforming to the terms of our Constitution.

(5) It seems highly improbable that an emergency such as has confronted agriculture during the past fifteen years will again emerge. Hence, the necessity of foregoing some forms of implementation included in the present Agricultural Adjustment Act would probably not stand in the way of a truly efficient organization of our agricultural industry.

REMARKS BY THE CHAIRMAN

HON. OGDEN L. MILLS: I am sure we are all very much indebted to Dr. Nourse for his remarkably clear and interesting paper.

Mr. Gilbert H. Montague, who has a legal practice which has led him widely into the field of industry, will discuss "Industrial Planning". Mr. Montague! (Applause)

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INDUSTRIAL PLANNING

GILBERT H. MONTAGUE

Chairman, Committee on NRA, New York State Bar Association
Chairman, Committee on NRA, Federal Trade Commission and Anti-Trust
Laws, Merchants Association of New York
Member, Committee on Unfair Trade Practices, Business Advisory and
Planning Council, Department of Commerce

BY "industrial planning" I here mean not industrial planning of the individual type which every business executive does in the conduct of his own business, nor industrial planning of the national type which in this country Alexander Hamilton inaugurated with his Report on Manufactures and Henry Clay popularized with his American System of tariffs and internal improvements.

"Industrial planning" as I here use the term is a national type of industrial planning in which the government, with the full force of coercive government compulsion, undertakes to regiment hours, wages, and conditions of employment, production and distribution, in what were previously competitive trades and industries.

There are many reasons why Coördinator George L. Berry and his associates in NRA are meeting with apathy and derision in their efforts to resurrect the semi-demolished NRA of which they are now caretakers. Industrial planning backed by government sanction and enforced by government coercion had the enthusiastic and whole-hearted support of the rank and file of American business throughout the first year of NRA. Failure was clearly in sight, however, long before the end of the second year.

Not since the Tower of Babel was halted by Divine wrath has so ambitious a project of industrial planning collapsed as when the Supreme Court dealt the fatal blow to NRA in May 1935.

In this debacle, there crashed to earth more than seven hundred codes and supplemental codes, nearly two thousand Presi-

dential executive orders, more than twelve thousand NRA orders, created not by any requirement of Congress but solely by executive orders of the President and carrying penalties of fine and imprisonment, all having the force and effect of an Act of Congress, and all comprised in nearly 18,000 printed pages of executive law, exceeding in quantity more than all the statutes passed by Congress since the foundation of the government, and more than twice the volume of all Congressional legislation now in force.

This colossal NRA code structure cost the government more than twenty million dollars, and cost industry more than seventy million dollars in Code Authority expenditures, and probably cost industry a great deal more than an additional seventy million dollars in legal, accounting and clerical expenses for formulating these codes and in traveling and hotel expenses for attending code meetings and code hearings, and probably cost industry a round half-billion dollars more in company executives' time occupied on code matters.

The functionaries who possessed under NRA, by a sort of Apostolic Succession from the President, authority delegated by or in behalf of the President to recommend for routine approval codes, supplemental codes, code amendments, executive orders, administrative orders, office orders, interpretations, rules and regulations of NRA, and rules and regulations of code authorities, product group code authorities and regional section code authorities, each having the force of an Act of Congress, aggregated, on a conservative estimate, upwards of five or six thousand persons.

The personnel of these thousands of law-making functionaries under NRA was constantly changing, and their particular identity at any given moment of time was, in the complete aggregate, absolutely unascertainable by anyone inside or outside of NRA.

These conditions, and the profusion with which functions and powers of the President under NRA had to be delegated by the President to thousands of functionaries inside and outside of the NRA, were necessarily a standing invitation to the possibility of hole-in-the-corner, particularistic, overlapping, coercive, monopolistic, uneconomic and unevenly enforced executive-made laws.

Do you want any illustrations? During the two years of NRA my office and I had occasion to advise clients or make appearances before NRA on upwards of two hundred of these seven hundred NRA codes. I will give you one or two episodes that are picked up almost at random.

To understand the first episode let me explain that members of the Structural Steel Fabricating Industry have long been accustomed to fabricate steel entering into the construction of buildings, bridges and other structures and to take and perform contracts for the erection of the steel they fabricate, and that competing with the Structural Steel Fabricating Industry for this erection work are various members of the General Contractors Division of the Construction Industry who do not fabricate steel but do compete for contracts to erect steel that has been fabricated by members of the Structural Steel Fabricating Industry.

Let me also explain that in the Structural Steel Fabricating Industry many of the craftsmen employed to do erection work are unaffiliated with any national craft union, but that in the General Contractors Division of the Construction Industry many of the craftsmen employed to do erection work are members of a national craft union that is affiliated with the American Federation of Labor; and that for common labor in erection work the code finally submitted by the Structural Steel Fabricating Industry to NRA for approval specified minimum hourly rates of seventy-five cents in the New York district and several cents less in other districts throughout the country, but that the code approved for the Construction Industry and the supplementary code approved for the General Contractors Division of the Construction Industry left these minimum hourly rates to be fixed by Regional Construction Planning and Adjustment Boards and by a National Construction Planning and Adjustment Board comprising an equal number of representatives from the employers in that industry and from "construction employee organizations" (i. e., national craft unions affiliated with the American Federation of Labor); and that the minimum hourly rates worked out by these Boards for the General Contractors Division and other Divisions of the Construction Industry have in many regions been substantially higher than those specified in the code submitted by the Structural Steel Fabricating Industry.

In the public hearing and in the post-hearing conferences which preceded the final submission by the Structural Steel Fabricating Industry of its proposed code to NRA for approval, the General Contractors Divisional Code Authority and the Construction Industry Code Authority strenuously contended that all erection work should be eliminated from the scope of the proposed Structural Steel Fabricating Industry code, in spite of the fact that throughout the entire existence of the latter industry members of that industry have been accustomed to take and perform contracts for the erection of the steel they fabricate.

This contention of the General Contractors Divisional Code Authority and the Construction Industry Code Authority was steadfastly resisted by the Structural Steel Fabricating Industry, and in the latter's code as finally submitted to NRA for approval the latter industry was defined to comprise not only fabricating but also contracting to do erection work.

Under the National Industrial Recovery Act, the President or the Administrator for Industrial Recovery in the President's behalf may approve a code applied for by an industry, or may decline to approve a code applied for by an industry, or "may, as a condition of his approval . . . impose . . . conditions . . . for the protection of consumers, competitors employees and others, and in furtherance of the public interest".

The obvious purpose and effect of the clause just quoted is that if "a condition of his approval" thus "imposed" by the President or the Administrator for Industrial Recovery in the President's behalf is not assented to by the industry applying for the code, there is actually no application before NRA for the code as modified by this "condition", and therefore there is in fact no code for the President or Administrator to approve.

Upon the recommendation of the NRA Division Administrator—who then was and still is president of another national craft union that is affiliated with the American Federation of Labor!—the Administrator for Industrial Recovery sought to avoid this dilemma by the following findings and order: He first found and ordered that the code proposed by the Structural Steel Fabricating Industry "complies in all respects with the pertinent provisions and will promote the policy and purposes of said title of said Act; and . . . that said code be

and it is hereby approved"; and then upon the recommendation of this NRA Division Administrator the Administrator for Industrial Recovery thereupon inserted in his order of approval this proviso: "Provided, however, that . . . all provisions governing erection work are hereby deleted and that such erection work shall be governed by the provisions of Chapter I of the Code of Fair Competition for the Construction Industry" (i. e., the supplemental code of the General Contractors Division of the Construction Industry).

To the credit of the Structural Steel Fabricating Industry be it said that this unwarranted departure by this NRA Division Administrator from the plain requirements of the National Industrial Recovery Act was resented by the Structural Steel Fabricating Industry which refused to favor or to sponsor or to be bound by the code as approved with this proviso which had been added upon the recommendation of this NRA Division Administrator, and that the Structural Steel Fabricating Industry steadfastly adhered to this position so long as NRA continued.

I don't think that this was an entirely anomalous procedure by NRA Division Administrators before NRA was finally struck down by the Supreme Court in May 1935.

It may be of interest to you to know, however, that the NRA Division Administrator who recommended this particular proviso in the abortive code of the Structural Steel Fabricating Industry was George L. Berry, who now as Coördinator of NRA has called the conference to be held in Washington in the second week of December in the effort to resurrect NRA.

Of this same NRA Division Administrator, one of his Deputy Administrators who had charge of a proposed supplemental code of another Division of the Construction Industry—in which Division the employees are also largely organized in a national craft union affiliated with the American Federation of Labor—wrote to the secretary of the sponsoring committee of that supplemental code a letter on May 9, 1934 stating:

—————, the Division Administrator, vetoes the proposal to submit the three questions drafted at our conference in New York on Monday night with reference to the Heating Piping and Air Conditioning Code to the NRA Policy Board for decision. He has instructed that your Code be sent in at once. In accordance with these instructions, I am calling for the Advisory Board's reports not yet in, namely

the Research and Planning and Legal reports. I expect to have these at hand tonight.

As you are aware, they will contain all sorts of objections to the approval of your code in its present form.

_____ [the Division Administrator] understands this very well, and it is his undertaking to get your Code approved in spite of all the objections that will appear in the Advisory Board's reports.

The name contained in the spaces which I left blank in the letter from which I have just quoted is the name of the present Coördinator of NRA, George L. Berry, who as Coördinator of NRA is now trying to resurrect it.

I have no doubt that Mr. William Green, President of the American Federation of Labor, for whose work in the NRA Labor Advisory Board I have great admiration, could cite many occasions in which favoritism was shown by NRA officials to employers instead of employees.

From these two episodes it is sufficiently clear that the particular kind of industrial planning represented by NRA was a standing invitation to the possibility of hole-in-the-corner, particularistic, overlapping, coercive, monopolistic, uneconomic and unevenly enforced executive-made laws.

It would be uncomplimentary to assume that NRA was ignorant of the existence and application of the common sense and constitutional and judicial tests which the Supreme Court has over and over and over again laid down as requirements that must be complied with by any commission or executive engaged in executive law-making under a delegation of legislative power.

One of the marvels of NRA was the wantonness with which it ignored the long line of Supreme Court decisions in respect of the requirements of a record that would show a factual basis and findings that would support its decisions in respect to any code or other action by NRA under the National Industrial Recovery Act, so that from this record a court might determine whether the executive-made law emanating from NRA was or was not within the four corners of the executive law-making powers delegated by Congress to the President and delegated by the President to the NRA officials whom the President appointed to exercise his powers under that Act.

NRA's flagrant disregard of all these Supreme Court decisions and all these common sense and constitutional and judicial

tests which the Supreme Court for nearly forty years has been continually insisting upon may account for the vigor and unanimity with which the Supreme Court struck down NRA in May 1935.

Probably the simplest explanation of NRA's behavior is that NRA set up its procedure without intention or realization that it was acting in defiance of requirements which the Supreme Court has repeatedly laid down, and that hastily and absent-mindedly NRA snatched at a form of executive law-making that was unconsciously but nevertheless essentially fascistic.

What is fascism? What is Hitlerism? Fascism and Hitlerism are epitomized, I think, in the speech which Hitler made to the Reichstag in the summer of 1934 after his so-called "purge": "It needed to be done", declared Hitler, "and I did it." That is the method which NRA followed. NRA did whatever it thought needed to be done, and for nobody, not even the Supreme Court, was there any record made by NRA from which anyone could determine whether NRA was or was not acting within the limits of the authority expressed in the National Industrial Recovery Act. Prior to the Supreme Court decision invalidating NRA in May 1935, NRA was bringing this country nearer to fascism and Hitlerism than we have ever been before in our history.

Thanks to the common sense and judicial and constitutional safeguards which the Supreme Court for forty years has been applying and enforcing, there was available in May 1935 a strongly resistant force against the fascism and Hitlerism which for nearly two years NRA had been increasingly developing in the political, business and social life of America.

If fascism ever comes in the United States, there will be no outward appearance of revolution. No American executive will ever set himself up as an avowed dictator. But when an executive can succeed in dictating everything, the name will not matter. Laws and constitutions guaranteeing liberty and individual rights may remain on the statute books, but the life will have gone out of them, and they will be only empty shells, if beneath these laws and constitutions the effectual power of the state is really lodged in the hands of an executive.

From this dangerous course, the Supreme Court last May, in obedience to its sworn duty under the Constitution, led Congress and the President back to the limits of authority pre-

scribed by the people in the Constitution, and again recalled to the world the great lesson of Magna Charta, which is that the Anglo-Saxon race will permit no executive to place himself above the supremacy of fundamental law. (Applause).

REMARKS BY THE CHAIRMAN

HON. OGDEN L. MILLS: Thank you, Mr. Montague, for your vigorous and refreshing presentation of your point of view with reference to the late NRA.

The Trustees of the Academy are very grateful to Mr. William Green, President of the American Federation of Labor, who has found time in the midst of a very busy life, to come here this afternoon to discuss the rights of labor under the Constitution. Mr. Green! (Applause)

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THE RIGHTS OF LABOR UNDER THE CONSTITUTION

WILLIAM GREEN

President of the American Federation of Labor

I ESTEEM it both an honor and a privilege to participate in the program so appropriately arranged for this annual meeting of the Academy of Political Science. The topic so judiciously selected for discussion, "The Constitution and Social Progress: Are Constitutional Changes Necessary?", is an especially timely subject and one in which Labor throughout the nation is greatly interested.

When Mr. Justice Roberts, in delivering the majority opinion of the Supreme Court declaring the Railway Retirement Act unconstitutional, stated: "These matters [questions of social security and welfare] obviously lie outside the orbit of Congressional power", feelings of deep concern and grave apprehension were aroused in the hearts and minds of working men and women throughout the length and breadth of the land. This judicial pronouncement, supplemented by the decision in the Schechter Case declaring the National Recovery Act invalid, raised with emphasis the fundamental question of how far the Constitution of the United States will permit Congress to go in the enactment of legislation for the economic and social welfare of all the people. This question is being repeatedly propounded by the workers of the nation who are moved by a sincere desire to find a convincing and satisfying answer thereto.

In discussing the rights of Labor under the Constitution a line of distinction must be discreetly drawn between those common, fundamental rights enjoyed by working people as citizens of the Republic and those rights which involve the relationship of employer and employee under our modern, rather complex industrial system. Obviously the workers possess and enjoy certain rights in common with all other citizens, political rights, the right of free speech, free assemblage, religious freedom, ownership of property, and the enjoyment of life, liberty

and the pursuit of happiness. These are common, fundamental rights conferred upon all citizens of the United States regardless of their social and economic status.

In considering the rights of Labor under the Constitution we find ourselves invading the field of employer and employee relationship for the purpose of making a study of judicial interpretations of the Constitution involving the rights of employees as well as of employers in cases which have been brought before the Supreme Court for final determination. What are the rights of Labor under the Constitution, and shall these rights be determined in the light of modern industrial developments or based upon the relationship of master and servant as that existed when the Constitution was adopted in 1787? The social and economic problems which beset us today and which have arisen out of the development and growth of America's industrial empire, were unknown to the Founding Fathers who framed and wrote our federal Constitution. The Constitution was drafted and adopted before the world knew the effects of the industrial revolution which has taken place. Even Labor as it is now known did not exist. There were, in the eighteenth century, mechanics, apprentices and a small percentage of building trades artisans. The rest were mainly agricultural laborers, domestic servants and sailors.

Labor legislation which has been passed by the states and the federal government directly determining the relationship of employer and employee was scarcely contemplated by the framers of the Constitution. Modern industrial conditions made necessary the enactment of labor legislation of an economic and a social character. The right of Congress to enact laws which confer upon Labor specific rights such as the right to organize free from the interference of employers and to bargain collectively, is based upon the delegation of power "to regulate commerce with foreign nations, and among the several states and with the Indian tribes." This grant of power to Congress has been construed broadly by the Supreme Court of the United States. Obviously, this was made necessary by the greatly expanding and closely interrelated network of business and industry which now extends all over the country. The power of Congress to regulate commerce enables it to pass laws which deal with interstate commerce but which nevertheless have their effect upon intrastate commerce.

The right of Labor to organize and to bargain collectively is not vouchsafed by the Constitution. Today it is recognized and accepted, both as an inherent right and as a primary requirement in the relationship of employer and employee. Labor did not possess this common right either in the United States or in England at the time the federal Constitution was written. The right of Labor to organize was first proclaimed in this country in a decision by Chief Justice Shaw of the Supreme Court of Massachusetts in the decision of *Commonwealth vs. Hunt* in 1842. In that case the Supreme Court of Massachusetts held that bootmakers had the right to organize and deal collectively with their employers. Now, the courts almost universally hold that Labor possesses this right to associate for mutual protection and collective bargaining. It is generally construed that this is a right which Labor enjoys under the federal Constitution.

Through the enactment of two notable laws, the Congress of the United States accorded legislative guarantees to Labor to engage in self-organization and collective bargaining through representatives of its own choosing. One of these laws is the Railway Labor Act of 1926, as amended in 1934, and the other is the National Labor Relations Act of 1935. Both of these acts forbid employers from interfering with, exercising restraint or coercion of employees in the exercise of this right, and, furthermore, forbid employers from fostering and financing company unions. In the well-known case of *Texas and New Orleans Railroad Company v. Brotherhood of Railway Clerks*, the validity of the Railway Labor Act of 1926 was upheld as a proper exercise of Congressional power. Mr. Chief Justice Hughes in a clear and forceful opinion in this notable case declared: "We entertain no doubt of the constitutional authority of Congress to enact the prohibition" (against interference by an employer with self-organization of employees). . . .

The courts have been impressed with the necessity of establishing equality of bargaining power between employer and employee. A number of decisions of the Supreme Court of the United States have stressed this point. Mr. Chief Justice Taft expressed it quite forcibly in the case of the *American Steel Foundries v. Tri-City Central Trades Council* (257 U. S. at 209), when he said:

They [labor unions] were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild.

Congress amplified in a most clear and definite way the very essence of this decision announced by Mr. Chief Justice Taft when it included in the Norris-LaGuardia Anti-Injunction Act the declaration of the public policy of the United States. This declaration is as follows:

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or

protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted."

Those employed upon the railroads as well as those employed in other industries which possess an interstate character enjoy these rights under the Constitution as guaranteed them in the two laws just referred to, the Railway Labor Act and the National Labor Relations Act.

In sharp contrast to these defined rights of Labor under the Constitution to which I have here referred, we find that Labor in the United States has been deprived, through the Supreme Court interpretations of the Constitution, of many legislative rights which the laws and constitutions of other countries permit working people to enjoy. The Supreme Court of the United States held invalid the act of Congress which provided for the establishment of a minimum wage law for women and children in the District of Columbia. This decision by the Supreme Court was rendered in the case of *Adkins v. Children's Hospital* and *Adkins v. Lyons*. In a more recent decision the Supreme Court held that the Railroad Retirement Act was invalid. This decision affected those employed upon the railroads of the Nation. The seriousness of this decision from the worker's point of view cannot be overestimated. It struck at a very vital spot in our constitutional and legislative procedure, the right of Congress to enact social security legislation.

These decisions by the Supreme Court have brought working people and all of their friends face to face with the question—how far will the Constitution, as interpreted by the Supreme Court, permit Congress to go in the enactment of legislation designed to protect their social and economic welfare. It is difficult for the layman to follow the line of judicial decisions relating to social justice and social security legislation. It would appear that there is delegated to the forty-eight states the right to enact legislation which affects interstate commerce only indirectly. However, this delegation of power to the sovereign states seems to be contradicted by the decision of the Supreme Court which rendered the states powerless to pass effective legislation to protect themselves from sweat-shop wages for the reason that the states have been deprived by the judicial interpretation of the exercise of control over the im-

ports from one state to another. Thus we have an anomalous situation, unlike that of any other country in the world. The federal government in the exercise of its power as defined by the Supreme Court cannot pass certain economic and social welfare legislation and the states are unable to make such legislation effective because they cannot protect themselves from competing products manufactured and distributed in other states under unfavorable working conditions.

In the *Schechter* decision the Court made it clear that the right to regulate minimum wages is not vested in the federal government but is reserved to the states, while the Supreme Court held in another decision that the District of Columbia, over which the federal government exercises control, could not protect women and children through the enactment of a minimum wage law.

The flexible application of the Constitution of Great Britain, where any social and economic legislation desired by the people can be enacted, is in sharp contrast to the comparative rigidity of our United States Constitution. Legislation is the final agency by which the law is brought into harmony with social needs. If this is tried and if those needs are recognized and supported by public opinion regarding the relationship of employer and employee, it logically follows that our own Constitution should be sufficiently elastic to permit such legislation to be validly passed by the nation's law-making bodies. The need for the enactment of such legislation arises out of the changes which take place in the growth of our cities, the mechanization of industry with its consequent displacement of workers, the increase in the number of workers and the steady conversion from an agricultural to an industrial nation.

Great Britain did not find it necessary to enact unemployment insurance, old age pensions and other social security legislation until it had reached the point where it was forced to care for a large and increasing army of unemployed. The facts were faced in Great Britain when it was forced to make a choice between the continued existence of a constant threat to the preservation of its government and governmental institutions and the enactment of social security legislation. It acted promptly by passing unemployment insurance, old age pensions, and other social security measures suitable to its social and economic requirements.

Now, here in America, is it not clear that we are approaching the point reached by Great Britain many years ago? What are we going to do here with our army of unemployed and the millions dependent upon them? The experiences of other nations and the economic facts which our own nation must face lead to the inevitable conclusion that our government must prepare to care for a constant large number of unemployed. This seems to be an inescapable fact, for it is now reasonable to conclude that when we reach the maximum of industrial production we will find that there still remain many millions of unemployed. If, under these circumstances, it is impossible to enact social security legislation necessary to care for the unemployed and those dependent upon them, the aged and the infirm, because of the limitations placed upon our legislative bodies by the Constitution of our country, what shall we do, or what action shall the people take? It is inconceivable that a democracy such as ours would admit its impotency to deal with its social and economic needs. It would and must find a way to overcome the obstacles, legal or otherwise, which prevent the enactment of adequate social security legislation.

The question whether or not the Constitution of the United States should be amended in order that constructive, practical social security and social justice legislation shall be passed by the Congress of the United States must be answered by its sovereign citizenship. This question may be very largely answered when the Supreme Court of the United States renders decisions in the AAA cases and when it passes upon the constitutionality of the Guffey Coal Act, the Social Security Act and the National Labor Relations Act. Labor has steadfastly believed that the framers of the Constitution meant in Article I, Section 8, Clause 1, of the Constitution, that Congress should have the power to provide for the general welfare of the United States. It may be, indeed it is hoped, that the Supreme Court will so decide. Many students of the Constitution entertain the opinion that the framers of the Constitution meant that this should be more a national government with greater powers invested in Congress than have yet been recognized by the Supreme Court.

Two of the most influential delegations to the Constitutional Convention were from Virginia and Massachusetts. The Virginia delegation submitted their views regarding the powers

the government should have. These views are today expressed in the Constitution of Virginia, which declares:

That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; of all the various modes and forms of government that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal.

And furthermore, the Constitution of Massachusetts contains the following provision:

All power residing originally in the people, and being derived from them, the several magistrates and officers of government vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.

Professor Elliott of Harvard pointed out, in a book published last spring on *The Need for Constitutional Reform*, the necessity for a living constitution, one which responds to the changing needs of the day. I am taking the liberty of quoting the following from Professor Elliott's book:

The other path is simpler. It consists in allowing the dead hand of the past, and the difficulty of amending the Constitution, to hold us in the grip of a fatal inertia. Rome as a republic suffered from a similar rigidity in its constitutional system, a separation of powers which was ultimately resolved by civil wars and dictatorships. Always in such a crisis of constitutional development it is the stand-pat conservatives who ultimately make the destruction of the system inevitable—because they demand impossible things of antiquated machinery. It is not those who would reform but those who would ossify a constitution who bring about its destruction. They are the true begetters of fascist Caesarism. The path toward Caesarism can hold no attraction for any student of Roman civilization.

The class issue is not the dominant one in America. Indeed everywhere it appears to be economic security more than economic equality that moves the masses of men. In America, however, unless we are to fail in our national mission and renounce our heritage, we can not forego that education in personal responsibility which is the painful price of democracy and constitutional government. If we lose this heritage, it will probably be through no fault of intention, but simply from the habit—fatal to any free people—of letting matters take their course until it is too late.

✓ Labor places a very high value upon all the rights which it enjoys under the Constitution of the United States. It seeks jealously to guard these rights as a priceless heritage. For this reason it is opposed to dictatorships, for it realizes fully that the enjoyment of freedom and liberty is a blessing which flows from the fountainhead of a democracy. This is the answer to the question asked as to why Labor staunchly defends, with all the force and resources at its command, our democratic institutions and our American form of government. Labor believes that the same power which created the government and framed the Constitution can take such action as may be necessary to meet the needs of a changing social and economic order. It is convinced that this can be accomplished in an orderly way and in accordance with democratic procedure and traditions. It is confident that under our democratic form of government all the rights of Labor declared and amplified, both by the Constitution and decisions of the courts, can be made real, vital and effective.

REMARKS BY THE CHAIRMAN

HON. OGDEN L. MILLS: Our next speaker is Mr. Lewis W. Douglas, Former Director of the Budget, who will discuss "The Planning of Taxation, Currency and Finance". Mr. Douglas! (Applause)

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THE PLANNING OF TAXATION, CURRENCY AND FINANCE

LEWIS W. DOUGLAS

Vice-President, American Cyanamid Co.
Former Director of the Budget

A PLANNED economy is one in which the government attempts to plan the economic activities of its citizens and undertakes to compel compliance with that plan. In some cases the authority of the state is exercised through ownership of all means of production. In others, it is exercised through control of credit and financial resources. While in still others, it arises out of control of credit coupled with an exercise of the taxing power. The significant and important characteristic of all planned economies is that the planning of the activities of individuals is undertaken by the state, either by direct or by indirect methods.

This is not the type of social and economic organization to which until recently we have been accustomed. Ours, on the contrary, has been one in which, theoretically at least, if not wholly in practice, the forces of competition have controlled and planned our economic life.

The significant and important difference is that in the first, economic activities are dictated by the state, while, generally speaking, under the latter, economic activities are controlled automatically by the competitive forces set in motion by many individuals acting and reacting upon one another.

In either type, the planning of taxation, currency and finance is not only a legitimate function of government, but one which the government must perform. In the first type, however, the purpose of taxation, currency and finance is quite different from that in the second. For in the first, they must be the instruments by which the state effects and enforces its plan of complete dictation, control and even operation of economic activities. In the second—the one to which we Americans are accustomed—they must be designed to permit individuals to perform their functions under free competitive conditions.

A discussion of the subject, within the limit of twenty minutes, must be predicated on an assumed social and economic organization of society. It is therefore assumed that the type of system—I don't like the phrase "type of system", but know of none better—for which taxation, currency and finance are to be planned is a free, competitive one.

Under our peculiar division of powers, taxation is a function of the federal government as well as of the many political subdivisions. Currency, however, in its strict definition, falls exclusively within the jurisdiction of the federal government. Finance—whatever that may mean—or the planning of finance in so far as it refers to governmental finance, is a function of state as well as of federal governments. Clearly, discussions of the subject in all of its aspects—federal, state, county and municipal—are far beyond the possibilities of this paper.¹ Consequently it will be limited in general to taxation, currency and finance of the federal power.

These three factors are related one to the other. They are like facets of a crystal, each bearing a molecular relationship to the other. All have as their axis federal budgetary policy. This, so to speak, is the hub of the wheel from which the spokes radiate.

Perhaps this assertion demands testing to determine its approximate truth. Let us assume that a government deliberately embarks on a policy of excessive spending, that it actually undertakes extravagant projects—fantastic projects—and that with almost unprecedented lavishness it disperses public funds. The government is then confronted with the dilemma either of continuing to operate at a deficit or of imposing heavy taxes. If it takes the first course, it eventually reaches the point where it can no longer borrow. It then manufactures fiat currency. Or if it does not actually print the money itself, it may sell its obligations to the central bank, which in turn prints the cur-

¹ Nor does time here permit of a discussion of planning for the external value of currency—that is, the value of our currency in terms of the other exchanges. I am not an expert in the field—nor, for that matter, in any field. It does not, however, seem out of place to point out that stable exchanges are essential to recovery, and that to attain and maintain this goal, a myriad of questions must be considered, such as flexible internal costs and prices, extent of tariff protection, foreign lending, central bank and budgetary policy.

rency. Thus the budget policy under these circumstances leads directly into a currency problem.

Or there is another course for the government to pursue—to force its obligations on commercial banks in consideration for a bank deposit. This obviously leads directly into the field of finance, not only because it is itself finance, but also because, among other things, it lays the foundation for a credit inflation which either must be checked before it gets under way, or, if not checked, runs its course into another severe deflation, shrinkage of values, unemployment, recurrence or continuation of government deficits, a banking crisis and probably socialization of the banking system.

This all flows from taking the deficit horn of the dilemma. If the other horn is taken, then taxes must be imposed to provide the revenues with which the extravagant expenditures may be paid without resort to borrowing.

Consequently it is safe and approximately accurate to say that the budget policy is the hub of the wheel.

When an individual undertakes to plan a certain course of action he carefully weighs, or at least he should carefully weigh, the hazards, the dangers, against the advantages. It is important that an individual do this for if he makes a mistake he and those associated with him are injured. Because what a government does affects the lives, not of one or two, not of a few, but of all its citizens, it is infinitely more important that the dangers as well as the advantages of a given plan be carefully and intelligently placed on the scales of wisdom.

Inasmuch as the essential element in the planning of taxation, currency and finance is a government's budget policy, and inasmuch as the hazards and advantages of a given budget policy throw light on its wisdom, it is not inappropriate to discuss it. I recognize full well that in doing so I am guilty of repetition.

Let us take a look at the hazards of a continuously unbalanced federal budget. When a government continues to spend more than its revenues, it eventually becomes bankrupt. This is exactly what happens to an individual who pursues the same course. But there are a few far-reaching differences. When an individual becomes bankrupt, his property is attached and taken away from him by his creditors. He, his family, his employees and, if he has any, his stockholders, or rather the

stockholders of his corporation, if there is one, are the exclusive sufferers. When, however, a government becomes bankrupt the situation is somewhat different. It does not file a petition in bankruptcy. It does not openly in so many express terms announce or have announced to the world that it is bankrupt. It does something quite different. This it does because its powers are greater than those of the individual. For while it has, just as has an individual, the power to appropriate and to expend money, it also has the power to manufacture money. This second power the individual does not have. It has been explicitly denied to him under the anti-counterfeiting acts. Consequently when a government finally reaches the point at which it can no longer borrow, instead of being legally declared to be a bankrupt, it exercises the second of its two powers—the power to manufacture money. The use of this power makes money buy less, or, stated in different terms, causes prices to rise. Constantly rising prices bear with wicked violence on the laborer and the middle class. Sometimes these classes are completely impoverished during the process. This is a great tragedy for any country, because the middle class is, in the final analysis, the spiritual and moral strength of a nation. Sometimes the suffering is so intense and poverty so great that profound social and economic changes take place.

This is not a mere theoretical statement. This is borne out by the experience of mankind.

It was government deficits which compelled the devaluation of the Roman coins. It was government deficits which caused the emission of paper money in France in the latter part of the eighteenth century and caused such intense poverty that the French Revolution went far beyond its original objective. It was the government deficits of many of the Colonies which caused them to emit paper and which created such deplorable conditions that the English Parliament in the 1760's passed an act prohibiting the practice.

It was government deficits arising out of the cost of the War of Independence which caused the emission of the famous "Continental" currency. It was the government deficits of the Republic of Texas which, during its brief existence as a sovereign, caused it to manufacture the "redbacks". The consequences were so profound that the people of Texas wrote into their Constitution a prohibition against the emission of any

sort of paper with circulating or legal tender privileges. Government deficits incurred during the Civil War compelled the emission of the "greenbacks" and induced the inflation of that period, which was followed by the long, painful, tedious depression of the 70's. It was government deficits which destroyed a part of the French franc (France was a creditor) after the World War. It was government deficits, among other things, which destroyed the German mark. Our own government deficits, incurred by World War expenditures, contributed to the credit inflation of the last decade and were in part responsible for the intense suffering during the subsequent deflation and depression. It was government deficits which destroyed the ruble and, as has frankly been conceded by Russian authorities, were so destructive that they were the most powerful weapon of the revolution.

This is the story of reason and of experience. To it there is no exception in the annals of government. Intense impoverishment, suffering, frequently revolution, are the dangers of continuous government deficits. This is what both reason and history teach.

At the inception of almost every period (except the war periods) the arguments for deficits—fiat currency—have been almost identical: just a little inflation to raise prices just a little, to relieve the debtor, or to spend to relieve suffering or to provide employment. These are the advantages claimed. Yet experience has demonstrated that the arguments were invalid, that the forces created gave the movement such momentum that in the course of time the action taken increased the disease for which the medicine was prescribed.

The process of meeting deficits has been varied. At first, paper was issued directly by governments. Then governments sold their obligations to central banks which in turn emitted the money. And now a new mechanism has been devised. Through both control and intimidation of the banking system, and because of other governmentally created factors, government obligations are sold to commercial banks. In most instances, no cash is paid. The government merely receives a deposit against which it draws its check. This circulates in payment of the government's bills and comes back into the same or a different bank to give the appearance of greater bank deposits. The process is as inflationary as the emission of

paper money, but it differs in that it leads directly to a credit inflation rather than directly to a currency inflation. It may, for many reasons, terminate in the actual emission of non-interest-bearing obligations—not necessarily because a government may elect to emit them, but because the weight of the forces brought into existence may compel it. In our own case, many devices may be operated to prevent such an ultimate culmination of deficit financing. For example, the Stabilization Fund of two billions, the purchase of government bonds by the many government corporations, and at some time in the future by the fund set up under the Social Security Act. All of these and many more devices may be used, but they amount simply to borrowing from Peter to pay Paul. They bear a strange resemblance to certain of the practices so rightly condemned when used by private individuals. Eventually, however, in the course of time—several years, perhaps—even they must prove inadequate, for, as we learned in the late lamented 20's, no people can long hold themselves in mid-air by pulling on their bootstraps.

But quite irrespective of the ultimate end, the sale of government bonds to banks leads to a credit inflation, which we have learned (or at least it is to be hoped we have learned) must end in a deflation—a depression—intense suffering—great unemployment—shrinkage of values—and banking crises. With a budget out of balance, none of the steps necessary to prevent this catastrophe can be taken. And it is very questionable as to whether the necessary acts would be taken even if the budget were in balance. For they might have political repercussions hostile to the party in power.

In view of the experience of nations, including our own, it must be concluded, or so it seems to me, that governments should plan and with a very grim determination cling to a budget in which expenditures are actually—not by fiat or legerdemain or deceit, but actually—in balance with receipts.

The question arises, naturally: How? By imposing taxes, is the answer. Taxes, too, are bad, for more frequently than otherwise they constitute absorption by the government, for non-productive purposes, of savings which otherwise would be at least partly invested for productive purposes, to provide both temporary and permanent employment. For this reason, among many, taxes are bad. But if there is to be a balanced

budget, and if all taxes are to be eliminated, then there can be no government, for governments cost money. Such a situation would be anarchy. Clearly there must be governments and clearly there must be taxes to pay the cost of those governments. The measure of the taxes, then, is the cost of the government. If a people elect to have a costly, extravagant government, they must accept the corollary, costly and extravagant taxes. But they should understand what they are choosing when they make the choice. Taxes are paid out of production. They are not just pulled out of a magician's hat by the waving of a wand and the mumbling of a few mystic, unintelligible words. No, this is not the way in which governments collect taxes; nor is it the source of taxes. Taxes are paid out of production; all costs are so paid, and taxes are merely an element of cost. Every man, every woman, who works, though he or she may not know it, pays taxes, by producing the goods, the commodities, which, when exchanged for currency, are taken in by the grasping taxgatherer. Sometimes Everyman pays again in the form of a higher price. Sometimes he pays still again by being without a job, for when costs rise, prices rise and consumption may fall, so that fewer people are employed in production. Or if Everyman is employed in a business which exports, higher costs here may make it impossible to sell in foreign markets. Hence the loss of employment. High taxes have been as prolific a cause of political revolutions as almost any other. They, too, crush a nation almost as effectively as does inflation. So let Everyman remember—let him not forget that though he may not personally meet the taxgatherer, he is constantly working for him. Taxes are paid out of the sweat of Everyman's brow; they are paid in the form of unemployment; they are paid in suffering.

These are the dangers—the evils—of high taxes. That they arise out of government expenditures is obvious, for if governments cost more, more taxes must be levied. If governments cost less, then taxes will be less. Clearly, then, a government should plan to keep its expenditures to a very minimum.

Now suppose we combine theory, experience and a practical understanding of the way in which, under free institutions, people react. The type of government which we have here evolved is to my mind the best ever devised by man. It was

brought into existence by men who had knowledge of the tyranny of dictatorship no matter in what cloak it may have been wrapped—no matter under what mask it may have concealed its countenance.

And yet this system of ours has its weaknesses in the weaknesses of human beings. Men become enamored of popular catch phrases, are susceptible to great emotional reactions, respond to careless though perhaps appealing formulas. Men *en masse* are not always rational. Crowds almost always are emotional. And so in the planning of taxation, currency and finance, or in the basic matter of planning a budget policy, it seems important to establish as many *red lights* as possible, to reestablish national danger signals. In a purely theoretical world, hermetically sealed off from the forces and pressures, the passions and the prejudices of mankind, a purely theoretical scheme of things would probably be successful. Unfortunately we do not live in such a world. We live among men with human reactions, we are governed by politicians many of whom in their own field seek only their individual interest just as in the fields of private endeavor many men turn their backs to considerations of public welfare. And so in planning a budget policy, or in planning any policy, for that matter, the practical consideration of human reactions becomes a necessary factor in the equation.

A balanced federal budget seems to be a desirable thing, for it is the heart of the internal currency problem. And a budget balanced by holding down expenditures and thus requiring lower taxes likewise seems desirable, for it increases both employing and consuming power.

Yet this is not all. Bearing in mind that we live in a practical world of human beings, the base of taxation should be so broad that there are as many taxpayers—paying directly, with full knowledge that they are paying—as there are beneficiaries of government expenditures. It matters not what rate they pay. But it does matter in a practical world such as ours that there be checks on political forces. Therefore in the field of government finance, were there as many taxpayers as there are beneficiaries of government largesse, the force of one would check the force of the other. Otherwise it may well be that deficits will continue until we are plunged into the chasm of a devastating inflation. For there is deep rooted in most

of us the romantic illusion that nothing really bad can happen to us.

And if, by chance a budget is temporarily out of balance, then the deficit should be financed by selling obligations to individuals who purchase them out of savings. For this is not an inflationary course and contains in itself an automatic check to excessive spending. Moreover, governments should be as meticulous about not supporting their own obligations in the market as the government requires individuals to be. Otherwise, a government, even though a democracy in form, is merely reasserting the doctrine of the divine right of kings—The King can do no wrong.

The foundation of the whole system of taxation, currency and finance, is budgetary policy. In a free country, of free people, there can be no lasting prosperity, no security, no freedom from the fear of catastrophe, until that policy is made consistent with the old rule of pay as you go. Throughout the ages it has been tested and found to be good.

REMARKS BY THE CHAIRMAN

HON. OGDEN L. MILLS: Thank you, Mr. Douglas. You have been preaching what to my ears, at least, sounded like pretty sound doctrine.

Professor Dowling, Nash Professor of Law at Columbia University, will initiate discussion under the ten-minute rule. Professor Dowling! (Applause)

DISCUSSION: NATION AND STATE IN ECONOMIC AND SOCIAL PLANNING

NOEL T. DOWLING

Nash Professor of Law, Columbia University

THE significant revelation of the afternoon's discussion is that a negative answer seems to be offered to the question at the top of the program, namely, Are Constitutional Changes Necessary?

True, there are some doubts here and there, some questions, some thoughtful and watchful waiting, but, on the whole, the speakers have addressed themselves to current problems with the assumption that they can be solved under the Constitution as it stands.

Now, Mr. Montague voices, I gather, a note of thanksgiving at the collapse of NRA's ambitious project of industrial planning. But I am not sure whether he ascribes that collapse to the impossibility of industrial planning because of difficulties in industry itself, or to lack of national power under the present Constitution, or perhaps to ineptness either of the statute or of the administrators or of both.

In referring to the fatal blow dealt by the Court he speaks chiefly of the delegated power aspect of the Schechter decision. But the government may remedy that situation, in part at least, if the Congress will do two things: first, assume a clearer and fuller responsibility for the determination of policies; and, second, insist upon, and give more time for, careful preparation of its bills. If, then, there can be such a thing as industrial planning, the decision in the Schechter case does not stand so squarely in its way as has been assumed.

As regards the power to regulate interstate commerce, I am not so sure that the Schechter decision has done much damage. Notwithstanding what has been said about the "chicken code" running out of bounds, there is still a wide area in which industrial codes can be applied under the national power. While the industrial codes of NRA were checked in the Schechter case, the basis of industrial codes was not destroyed.

Turning now to another paper for a moment, how stands the case for Labor? While in the present state of affairs Mr. Montague is entitled to feel temporary relief at the collapse of NRA, Mr. Green would be entitled at least to feel something of permanent dismay at the annihilation of the railroad retirement and pension plan. Whereas the Supreme Court toppled over the superstructure of industrial codes, that Court through the pronouncement of the majority blew the ground out from under railroad pensions. That is the effect of the pension case as it appears in the general acceptance.

With that case in the books, I am very much interested in noting that Mr. Green restricts his discussion largely to the rights of Labor that have been recognized and sustained, dwelling less fully upon the rights of Labor that have failed to meet approval at the Court's hands. He refers to the Brotherhood case¹ in which the Supreme Court did recognize the rights of Labor in the matter of collective bargaining through representatives of its own choosing. That case ought to furnish Mr. Green some comfort as he surveys the situation since the pension case, because it illustrates how a very considerable relaxation may come about in the strict views previously expressed by the Court. For he will remember, of course, that the Brotherhood case discloses a much broader view of the commerce clause than the Adair case,² in which the Court held unconstitutional an act of Congress aimed at contracts in derogation of the bargaining rights of Labor. There is a certain structural similarity between the opinions in the Adair case and the retirement board case. In the Adair case the statute was said to be unconstitutional on two grounds: first, because it violated the due process clause of the Fifth Amendment; and, second, because it was in excess of the delegated power over commerce. Precisely the same was said in the pension case.

Now, in spite of the suggestion made by the majority in the pension case that there is some overlapping in those two questions, it seems to me that they are distinct, and that no decision can be based on both of them at the same time. Consequently, when the Court held, as it did in the Adair case and as it did also in the railroad pension case, that the particular statute

¹ *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548 (1930).

² *Adair v. United States*, 208 U. S. 161 (1908).

under consideration violated the Fifth Amendment, that was the end of that statute for that case—and it ought to have been an end of the case.

If you look at it from that point of view, then what the Court said in the pension case about the commerce clause might be considered (though I am not optimistic that it will soon be) as *dictum* unnecessary and, in my estimation, unfortunate.

There is some reason to believe, therefore, that the railroad pension case is not quite so bad as it appears upon the surface, that part of the majority opinion may ultimately be thrown into the judicial discard as *dictum*, and that the views of the minority may yet prevail. (Applause).

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PART III

AMERICA CONSIDERS ITS CONSTITUTION

INTRODUCTION *

WESLEY C. MITCHELL, *Presiding*

President of the Academy of Political Science

Professor of Economics, Columbia University

Director, National Bureau of Economic Research

ONE of the services which the Academy seeks to perform is to provide at stated intervals an open forum for the discussion of problems that affect the general welfare. Very little is to be gained by discussing problems about which we all agree in advance. The problems that are worth discussing are those about which we differ. If we really possess the open-mindedness, the flexible intelligence, the public spirit with which we like to credit ourselves, we profit most by hearing the grounds for opinions that are not in harmony with our own.

To discover that we have taken a one-sided view of some issue, that the notions we have entertained are based upon partial knowledge, that some of our cherished ideas have no firmer basis than untenable preconceptions, that there is a much stronger case than we had supposed for the opposite opinion, may not be an altogether pleasant experience, but it is a wholesome one. The Academy tries to arrange each of its sessions in such a manner that every member of the audience may at some stage of the discussions feel growing pains. If anyone present goes home feeling that the evening has been one of unalloyed delight, he will be one of our failures.

We seek speakers who can present most effectively the opposing views upon the problems under consideration, the views that ought to be considered before coming to decisions. The

* Opening remarks at the Fifty-fifth Annual Dinner Meeting.

men who address the Academy are men of eminence, and men who seek to persuade our reason, not to arouse our passions. The one quality they all have in common is that their views merit serious and dispassionate attention. It is a point of pride with the Academy that so many men of high distinction have been ready to participate in our programs side by side with their peers who belong to opposing camps in the fields of policy.

All this was said this morning by Judge Ransom in opening the first of our sessions and he went on to make a further remark which I have pleasure in echoing. Probably in all the fifty-five years of the Academy's history, we have never discussed a problem of greater concern to Americans than the problem to which this annual meeting is devoted, "The Constitution and Social Progress: Are Constitutional Changes Necessary?"

Seldom has it been the good fortune of the Academy to secure the assistance of so distinguished and so competent a list of speakers. At this morning's session a Professor of Government at Harvard, the Assistant Attorney General of the Federal Department of Justice, the Senior Circuit Judge of a United States Circuit Court of Appeals, and the Attorney General of Ohio joined in discussing "The Supreme Court and the States". At the afternoon session "Nation and State in Economic and Social Planning" were discussed by one of America's leading agricultural economists, by a lawyer who has had an extraordinarily wide experience in dealing with business operations subject to some type of government control, by the President of the American Federation of Labor, and by a former Director of the Budget.

At this evening's session upon "America Considers Its Constitution", we are to hear a member of the President's Cabinet, a former Governor of Massachusetts, and a former Undersecretary of the Treasury.

Among all the men whom I have known in public life, none seems to me so distinguished by intellectual candor as Secretary Wallace. (Applause). Fifteen years ago he made a reputation among my professional brethren, the economists, by publishing a slender volume upon agricultural prices. That book was marked by a scholar's care and a scientist's mastery of technique. These qualities live happily in Secretary Wallace

alongside an apostolic concern for the spiritual as well as the material well-being of men. (Applause).

No one of those who have borne a responsible share in the great experiments in social organization which the country has been trying, has been so alert as he to uncover imperfections in his first arrangements, so keen to hear and profit by sound criticism, or so intent to find out the full results of his plans upon the fortunes and upon the minds of those who are affected directly or indirectly.

Before his eyes there is always a high vision of a social organization in which all of us might realize our fullest individual potentialities through mutual service. It is toward making this ideal the reality of a workaday world that he has been striving with a tenacity undaunted by all the difficulties in his way.

I have the honor to introduce the Honorable Henry A. Wallace, Secretary of Agriculture. (Applause).

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AMERICA CONSIDERS ITS CONSTITUTION

HON. HENRY A. WALLACE
Secretary of Agriculture

MEN in public office should never make predictions, but it seems desirable this evening to begin with two. The first one is this: Social change will continue in every field of human activity until the end of time. The second one is this: Our institutions—notably our economic and political institutions—will adapt themselves to social change or they will vanish.

To students of history both of these statements must seem more like platitudes than predictions; yet their application to any given institution on any given date can lead to emotional outbursts of great intensity. It so frequently happens that what is a platitude to the scholar is poison to the politician.

This fact in itself illustrates the cultural lag which has to be overcome if America is to look at its Constitution objectively, and if ever we are to harness the forces of change to the general advantage. Occasions such as this, under auspices so clearly non-partisan and devoid of prejudice, can do much to stimulate discussion on a basis of fact rather than prejudice. Perhaps of even greater importance, occasions such as this can help the people of the United States recapture some of the spirit and some of the wisdom of the men who framed the Constitution.

It was an intensely practical wisdom. The Founding Fathers, who for the most part were vigorous, vivid young men full of ideas that were strange in 1787, were not establishing a form of government in a vacuum. They were not only aware of conflicting economic interests, but in some degree represented them. They were surrounded and were wrestling with hard, discouraging facts. Several of them were profound students of political economy, it is true, and the wisdom of the ages was known to them; but the facts of the situation about them materially modified whatever abstract principles they cherished.

The distressful conditions under the Articles of Confederation surely called for action. Even those who feared the idea of a strong central government had to agree with Hamilton that there was hardly a symptom of "national disorder" which did not "form a part of the dark catalogue of our public misfortunes." Under the Articles of Confederation there was no executive department and no general judiciary. The national legislature, consisting of one house in which the states had an equal voting power, was wholly without power to regulate commerce or to tax directly. It was unable to pay the holders of public securities either interest or principal. Private rights in property were in continual jeopardy. State legislatures were without restrictions or judicial control. Internal improvements were neglected, trade disrupted both at home and abroad, money of uncertain value and credit deranged, citizens insecure in their homes and effects, harassed by fears of Indians on the frontier and foreign enemies on the seaboard. Washington heard of sentiment for the establishment of a monarchy, and was horrified. In other quarters the opinion was seriously entertained that perhaps the best way out would be to partition the thirteen states into three separate nations.

It is not surprising, therefore, that our forbears set forth in words crowded with meaning their purpose "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general welfare, and secure the Blessings of Liberty to ourselves and our Posterity. . . ." For certainly under the Articles of Confederation the Union was dangerously imperfect, justice was pursued but seldom caught, riots and fears of discord shattered domestic tranquility, there was no adequate provision for the common defence, the general welfare was ignored, and the liberty was the liberty of ineffectual government and chaos.

It is impossible to overestimate the obstacles these men overcame. Distance was measured in days and weeks, not fractions of a second. Physical barriers bred intellectual and psychological barriers. The society of that day, both economically and politically, was in many of the colonies not so very far removed from feudalism. Distinctions of class and occupation, of race and religion, were often very marked. It required more than average intelligence and vision to look beyond present facts toward the future and to build so boldly for what they believed would be a continually expanding America.

The most significant fact of that period, it has always seemed to me, was the fact of individual self-sufficiency. Self-sufficient individuals have need of only as much government as is required to ward off foreign foes, and to resolve the inevitable domestic conflicts that flow, as Madison put it, from the "diversity in the faculties of men, from which the rights of property originate." Government so conceived is likely to be a negative, rather than a positive, agency.

The average New England farmstead provided perhaps 75 per cent of all its economic goods and services itself. Another 20 per cent came from the village with its blacksmith (who on occasion could also pull a tooth), its mill, and its craftsmen and journeymen. Probably not more than 5 per cent of this household's goods and services came from the world outside. There was of course specialization of work as between women and men, farmers, craftsmen, traders, and slaves; but the village and surrounding farms considered together came very close to being a self-sustaining unit. As such it could keep on functioning, and life within would proceed much as usual, no matter what happened to the rest of the country.

Facts such as these formed the environment in which the Constitution was born, and increased the odds against its approval. As it was, historians estimate that not over 5 per cent of the total population—or about 160,000 persons—voted on the adoption of the Constitution. Of these, Beard estimates that about 100,000—or about one in six of all adult males—voted for adoption.

The vote was further evidence of the truth of Madison's observation that the chief business of government consists in the control and adjustment of conflicting economic interests. The Constitution itself reflected these conflicting interests, and we gain in understanding it by admitting as much. As Beard has well said, "It was largely by recognizing the power of economic interests in the field of politics and making skillful use of them that the Fathers of the American Constitution placed themselves among the great practising statesmen of all ages and gave instructions to succeeding generations in the art of government."

Were Madison, Hamilton and their colleagues alive today, it seems to me they would insist upon relating the Constitution to the surrounding environment. It would be characteristic

of them to study how best to control and adjust conflicting economic interests. Their objectives, I am sure, would be unchanged. They would still desire above all "to form a more perfect Union", and within that Union to protect diversity, to establish justice and liberty, and to provide for the general welfare. These desires have not changed in any truly fundamental way. They are still the American creed.

They come up for discussion today because the means of achieving them are in doubt. And the doubt is the product of the enormously significant facts of social change since 1787.

It does make a difference, for example, whether our economic and political institutions are to serve a nation of less than four million people clustered chiefly along the Atlantic Seaboard, and with only 3 per cent of them living in cities, or whether they are to serve 120 million people scattered over two billion acres, and with half of them living in cities. It makes a tremendous difference—economic, political, cultural—whether your neighbor or your market is weeks distant or hours distant. It makes a great difference whether political institutions are intended to provide for the growth of a nation with plenty of economic elbow-room, or whether they are to provide for a nation economically mature. It is of considerable moment whether an economic society is young and based on free opportunity for individual enterprises, each relatively self-sustaining, or whether it is mature and made up of a mixture of individual enterprise, vast corporate enterprise, and governmental enterprise, with the economic freedom of the individual greatly reduced. It is a matter of great significance when economic interests change in size and power, and so gain or lose the privilege of dictating the rules of the economic game.

The whole problem has never been better presented than in the report on "Recent Social Trends", prepared under the chairmanship of our distinguished presiding officer of this evening, Dr. Wesley C. Mitchell, and made public in 1932 at the instance of Mr. Hoover.

"Unequal rates of change in economic life, in government, in education, in science and religion", that report observed, "make zones of danger and points of tension. It is almost as if the various functions of the body or the parts of an automobile were operating at unsynchronized speeds."

And then the report gave names and places, revealing how science and invention walked with seven-league boots, and how government crawled; how amazing accomplishments in production were periodically ditched by an equally amazing *lack* of accomplishment in the distribution of income and purchasing power; how attempts to bring the laggards even with the leaders had always to contend against prejudice and ignorance and inordinate greed.

"The result has been that astonishing contrasts in organization and disorganization are to be found side by side in American life: splendid technical proficiency in some incredible skyscraper and monstrous backwardness in some equally incredible slum."

"Social institutions", the report continued, "are not easily adjusted to inventions. . . . There is in our social organizations an institutional inertia, and in our social philosophies a tradition of rigidity. Unless there is a speeding up of social invention or a slowing down of mechanical invention, grave maladjustments are certain to result."

The hopeful thing is that our institutions not only can be changed, but actually are changed from generation to generation. The process of adaptation to social change often goes on almost unnoticed. A prime example is the institution of private property.

In the minds of the men who framed the Constitution it was a fundamental duty of government to protect the institution of private property. Not all agreed on how this was to be done, or even the degree to which it should be done. Apparently it was not the most appealing consideration to such contemporary leaders as Thomas Jefferson. But it was the concept which dominated the Constitutional Convention.

Madison, who spoke very frankly of his fears that a landless proletariat might effect a fusion with other discontented interests and so endanger the "rights" of the minority, declared that, "To secure the public good and private rights against the danger of such a faction and at the same time preserve the spirit and the form of popular government is then the great object to which our inquiries are directed."

Since individual enterprise was the prevailing order of that day, and since with it went a high degree of economic self-sufficiency, the possession of property of course meant complete

control over it. The "independent" man, the "self-made" man, and similar expressions had more meaning in that day than they have ever had since. Accordingly the institution of private property was, in the minds of the Founding Fathers, one of the fixed principles of our polity.

Yet in every generation since then, the social trends report observes, "the right of man to do what he will with his own has been curbed by the American people acting through legislators and administrators of their election."

The Proclamation of Emancipation and the 13th Amendment abolished property rights in slaves; the 18th Amendment disregarded property rights in the liquor traffic; in every large city what a man may build on his property is restricted by zoning regulations; the owners and operators of public utilities are subject to public regulations; possessors of income are subject to tax. In all of these cases the people, acting through government, have deliberately curbed the right of a man to do what he will with his own, and have said that contracts must not be contrary to the general welfare.

But government has not been the only modifier, nor even, perhaps, the most significant. Contrast the property rights of a merchant or a farmer in 1787, with the property rights of an investor in one of our huge modern corporations. The investor may draw such dividends as the directors of the corporation see fit, and he may sell his stock when he pleases, but that is the extent of his control over his property. He has nothing to say about the price and production policies governing the products of his property, though his whole welfare may depend on them. There is the further irony that the men who control his property, and who do have a voice in making price and production policies, as often as not have many of the privileges of a property-holder but few of the obligations.

Yet we live in an economic society increasingly dominated by the large corporation, carrying out price and production policies which affect the welfare of all of us. The "invisible hand" may still be operating, but it is not the invisible hand of which Adam Smith wrote. Are our corporate lords and masters, who have so radically altered the institution of private property since 1787, willing to reconsider our political Constitution in the light of their own significant alterations in our

economic constitution? Or must we take the unkind view that when vested interests were localized, they wanted a strong central government in order to protect their property from control or regulation by local governments, whereas now that these interests are themselves interstate and strongly centralized, they want a weak central government in order to protect their property from control or regulation by the central government? Justice Holmes once remarked that the 14th Amendment did not, after all, write Herbert Spencer's *Social Statics* into the Constitution.

It was the view of Mr. Hoover's Committee on Social Trends that this problem of unequal social change, of high speed in one field and slow speed in another, can only be met if first of all there is "willingness and determination to undertake important integral changes in the reorganization of social life, including the economic and political orders, rather than the pursuance of a policy of drift." The outstanding problem is to bring powerful individuals and groups to see that interdependence is a fact, and that the old phrase, "No man liveth unto himself", was never more true than it is today.

"In any case, and whatever the approach", the Committee on Social Trends concludes, "it is clear that the type of planning now most urgently required is neither economic planning alone, nor governmental planning alone. The new synthesis must include the scientific, the educational, as well as the economic (including here the industrial and the agricultural) and also the governmental. All these factors are inextricably intertwined in modern life, and it is impossible to make rapid progress under present conditions without drawing them all together. . . . More important than any special type of institution is the attainment of a situation in which economic, governmental, moral and cultural arrangements should not lag too far behind the advance of basic changes."

Since 1932 the word "planning" has become a hissing and a by-word, but in 1932 it was still possible for a group of eminent social scientists to be detached and to talk about planning without fear of offense. Fundamental problems do not get themselves solved in three or four years, no matter how vigorously they may be attacked. And there is always the danger that an improvement in economic conditions will tempt men to assume that all that remains is to repeat some simple

slogan until a populace weary of thinking will discover in it the shining, all-embracing truth.

No, the modern emphasis has to be on interdependence and balance. There is as much need today for a Declaration of Interdependence as there was for a Declaration of Independence in 1776. That typical New England farming community of the 18th Century, of which I spoke earlier, was 95 per cent economically independent of the rest of the nation and the world. The rest of the Colonies might have suddenly disappeared, and the community could continue to function. Of how many communities in America could that be said today? Merely to ask the question is to answer it. And if farmers, with the help of government, should today achieve even a 50-per cent economic self-sufficiency, as compared with their present 20 to 30 per cent, the result would be the starvation of many millions in our cities. A change of this sort might be brought about slowly, but brought about rapidly it would prove a catastrophe.

The modern emphasis has to be on the interdependence not only of individuals, but of large economic groups. The power of the modern pressure group to get what it wants from government, and from other groups, is really at the core of our problem. There were special interests in 1787, to be sure, but they had a strong sense of obligation to national unity, and they lacked the modern means of overnight enlisting the prejudices of millions. Today conservatives fear the possibility of a fusion of one set of interests, while liberals fear the fusion of another set. It is possible that both fears are justified.

In this situation I can see only one solution, and that is to require of each of these special interest groups a subordination to the general welfare. It is either that or permit the general welfare to be an afterthought, a product of chance.

Can these modern groups subordinate themselves to the necessity of forming a more perfect union, of securing justice, of providing for the general welfare, of securing the blessings of liberty? Can we, under our Constitution, meet the problem presented by these groups? The answer depends on our willingness and determination to undertake important integral changes in our economic and political institutions, rather than the pursuance of a policy of drift—in brief, we shall have to be as true men as the framers of the Constitution in 1787.

We are a little farther ahead in our thinking today than we were ten years ago. We are more inclined, these days, to call things by their right names. We admit the existence of pressure groups. Most of us agree that the rise of the pressure group has played hob with representative government as the Founding Fathers envisioned it. Many of us, it is true, wish we might go back to the good old days, as we imagine them to be, but I have yet to see a practical program for getting us back there.

The farmers have been the last to become an organized pressure group. They entered the field reluctantly, and only when compelled to do so by the effects of the use of governmental powers by other pressure groups. They saw business using such governmental devices as the tariff and the corporation to the advantage of business and the disadvantage of agriculture; they saw labor, though much less successful than business, win certain governmental rights and privileges. Farmers saw all this and much more happen within the framework of the Constitution, and they decided that perhaps there was room for them, too.

Farmers know there are some who contend that governmental powers ought not to be loaned to either agriculture or labor, but farmers reply that it is either that, or turn back the pages of industrial history 100 years. They believe it is to the Nation's best interests that agriculture be permitted to meet the other major groups on equal terms.

There should not be any quarrel at this late date with the facts of the interdependence between agriculture and the rest of the national economy. It is plain now, if it was not a few years ago, that our post-war tariff policy worked its greatest injury on agriculture. The price and production policies of our great corporations engaged in either buying from or selling to farmers; the impact of freight rates, and interest charges, and taxes, and banking and monetary policy—in all these and many others, the stake of agriculture has always been great, if in effect ignored until recently.

The interdependence of agriculture and the nation as a whole involves the broad facts of income, national resources, and population. Farmers buy the products of city factories. When farmers have no income, their buying stops, and city factory workers go on relief.

A railroad man recently told me that his road's agent at Des Moines, reporting freight movements for the year 1932, proudly declared that his district in 1932 had shipped *out* 429 more cars of freight than ever before. In that year hogs were selling for around \$3 a hundredweight, corn was 20 cents a bushel or less, and many a farmer took to burning corn in his home because he couldn't afford to buy coal. So my railroad friend asked the agent, in view of the increase in the number of out-bound cars, how many cars of freight were shipped *into* that district in 1932. The answer was 157 cars *less* than the year before. Such unequal trade cannot long continue.

Farmers are the custodians of the nation's basic natural resources, the soil. When farm prices go below certain levels, while fixed charges stay up, it takes more bushels of wheat and corn, more pounds of cotton per farm to pay interest and taxes, and to buy products whose prices are relatively rigid. To replace the fertility taken by crops, to keep out of production fields subject to erosion, becomes progressively more difficult. The soil suffers. When the soil suffers beyond a certain point, the people of the United States are running up a bill which few civilizations have ever been able to pay.

To an increasing degree our cities draw upon the open country for population reserves. In none of our large cities is there a sufficient excess of births over deaths to maintain the population. The cities depend upon the open country for their future man-power. Yet the expense of rearing those future city dwellers, of educating them and of maintaining their health, falls upon country people.

Facts of interdependence such as these are in the minds of farmers when they ask to be on equal terms with other major producing groups in the use of governmental powers.

Nevertheless, giving each of our major producing groups comparable governmental powers is not a final answer to our economic and political problems. Free competition among pressure groups is not likely to produce what anybody wants. The difficulties that remain can be illustrated by reference to an editorial on the agricultural adjustment program in one of the fairest of the metropolitan newspapers. This editorial, mildly critical of the adjustment program, contained the following statement:

"The parity-price plan, by attempting to subsidize special favored groups and by ignoring all these changes in the conditions of demand and production, must run into difficulties of constantly increasing gravity and complexity."

There is much truth in this comment on the consequences of the use of governmental powers by one particular pressure group, but what of the other great pressure groups? The parity-price plan for agriculture is not the first effort at governmental favoritism. Students of tariff history might produce some interesting items, beginning with 1789, and taking such curious forms as an export subsidy to New England's codfishing industry, with government payments of so much per year per boat. In one form or another this subsidy continued until after the Civil War.

Suppose the editorial quoted above were applied to the tariff rather than the parity-price plan! You would then find it reading:

"The tariff, by attempting to subsidize special favored groups and by ignoring all these changes in the conditions of demand and production, must run into difficulties of constantly increasing gravity and complexity."

Ever since the United States became a creditor nation at the close of the World War, the United States tariff has so interfered with the normal functioning of the law of supply and demand on a world-wide scale as to produce "difficulties of constantly increasing gravity and complexity" sufficient to cause tens of billions of dollars of international losses and immeasurable international misunderstanding.

Or consider still another form of governmental favoritism, the right to organize a corporation. The editorial statement might then read:

"The corporate form of organization, by giving special powers to special favored groups, and by ignoring all these changes in the conditions of demand and production, must run into difficulties of constantly increasing gravity and complexity."

It seems to me these "difficulties of constantly increasing gravity and complexity" will never be solved until two things are possible: First, acceptance by each group of obligations to the public comparable with the governmental powers granted by the public; and second, integration of each group program

with a conscious, continuous national economic policy that runs across political administrations for as long as may be necessary. I am now referring to things which must of necessity concern any group in control of our government, whether Democratic, Republican, Fascist, Communist, reactionary, conservative, liberal, pink or red. And I am hoping that the general objective I am about to advance, which for purposes of effective presentation I have made somewhat more specific than would otherwise be necessary, might so recommend itself to the fair play instincts of the American public that all political parties alike might see fit to incorporate it in their next platforms.

The material objectives which would undoubtedly appeal to all groups, classes, and parties can be briefly stated somewhat as follows: Our national economic goal must be increased balanced production of the things which people really need and want (1) at prices low enough so consumers can buy, but high enough so producers can keep on producing, and with the income so distributed that no one is shut off from participation in consumption, except those who refuse to work; (2) with scrupulous regard for the conservation of our remaining natural resources; and (3) by means characteristic of our traditional democratic processes.

Let me propose this as the material essence at the moment of our economic goal. Consider it a statement designed to safeguard, under modern conditions, those timeless political objectives stated in the preamble to the Constitution of the United States. Parenthetically I may say there are certain cultural and spiritual matters of profound significance which may or may not be comprised in any economic statement of this sort.

How can we get a powerful pressure group to work toward that objective on behalf of the General Welfare? "Moral suasion" won't do the trick. Powerful parties in foreign countries have been working on the problem, but we do not believe they have the answer for American conditions. Moreover, we don't like the way they define justice, domestic tranquility and liberty. Apparently we have no alternative but to invent the necessary social machinery out of the materials at hand here in America.

We need devices, as I have said, that will require pressure groups to consider the general welfare. When a pressure

group obtains governmental powers, such as a tariff or a processing tax, or when it employs such legal devices as the corporation for purposes which have tremendous social consequence, then we must exact of such a group certain reciprocal obligations toward the general welfare. There is such a device written into the Agricultural Adjustment Act, in the form of a price ceiling beyond which the whole mechanism cannot go. Shouldn't other groups using governmental powers be subject to comparable restrictions?

But something more than negative restrictions on pressure groups is required. We need some way of referring the activities and aspirations of all these pressure groups to rational long-time policies. I mean policies that cut across administrations and ignore party lines, policies which will grow out of the answer the people give to certain key problems.

A first step in arriving at national policies, obviously, is to find out the wishes of the people with regard to such controversial issues as the tariff, processing taxes, monetary policy, corporate controls, and so on. But as things stand we have no adequate machinery for discovering what the fully informed will of the people, uninfluenced by special interest propaganda, is on individual problems. With regard to personalities and to high pressure slogans, the American people express their will with alacrity; but with regard to complex matters of the gravest national importance, we do not function effectively. If our democracy is to continue, our elections must more and more reflect the matured intelligent decision of the electorate on fundamental issues.

Writing on this topic less than a year ago I proposed one or two new devices. Feeling that the idea of direct non-partisan decision on key matters of national policy had hardly ever been tried, I suggested the use of a national referendum on specific issues, the frequency and content of the questions up for referendum to be determined by some sort of non-partisan national council.

The idea of the referendum was rather widely discussed and generously criticized. Much of the criticism was well warranted. Nevertheless, the need for some way of discovering, formulating and adhering to key national policies is greater than ever. I have wondered whether a Council on the General Welfare, properly located and empowered, acting under some

such economic charter as I suggested a moment ago, could help us achieve this. If so, it is worth thinking about.

Government does achieve continuity in some matters. We have the office of Comptroller-General, for example, wherein the very able J. R. McCarl sees to it that the executive branch of the government, whatever the party in power, follows a certain continuity with regard to the auditing and bookkeeping of government expenditures. The benefits of this much continuity must be obvious to everyone.

Originally this accounting function was taken care of by a small branch of the Treasury Department. A long succession of statutes testifies to the growth of this function, and to its increasing importance to successful government. In 1894 there was a general revision of the statutes dealing with the accounting officers, and in 1921 the new office of Comptroller-General was created to consolidate and coördinate the accounting and auditing functions. The unique feature is the 15-year term of office, assuring a high degree of continuity in this particular field. A need impossible to foresee in the 18th Century, became evident in the 20th, and was intelligently met.

There are certain subordinate agencies of the government—the Forest Service is an example—where it is found possible to adhere to certain definite policies for the General Welfare regardless of which major party is in power. The emphasis on these policies will of course vary from administration to administration, but the main lines stand intact.

It is on the key matters of national policy, often the most highly controversial topics, that our lack of continuity has been most marked. Yet that is where we need it most. Only the other day a prominent business man contrasted corporate planning with governmental planning, much to the latter's disadvantage, and added: "There is no continuity of policy in government."

As things stand this is a no-man's land. That this is so is not in any sense a reflection on any existing branch of government. Change in our economic relationships, and in the technique of powerful pressure groups, has simply proceeded faster than change in governmental devices.

Many might wish that the Supreme Court could chart and announce the wise course on matters of national economic policy, but the Court itself has again and again declared that

this is no part of its function. Innumerable decisions of the Court may be cited. Most recently, in the *Schechter* decision, the Supreme Court declared that "It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system." The year before, in the *Nebbia* case, referring to the right of a state to adopt a given economic policy designed to promote the general welfare, the Supreme Court declared: "The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it." And again, in the same decision, quoting from an earlier decision in the famous *Northern Securities* case, the Court continued: "Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine." And finally, from the decision in the *Nebbia* case: "Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

The idea of a Council on the General Welfare is brought forward in the hope that it may be seriously and critically discussed, but with full knowledge that analysis may reveal grave disadvantages. It is a device, as I have said, designed to help us discover, formulate and adhere to intelligent national economic policies. Such a council might be composed of four or five of our most eminent economic statesmen, men of the caliber—if he will forgive me for embarrassing him—of our presiding officer of the evening. The council would obviously have to be non-partisan both in letter and spirit. It could not function if it were composed of dogmatic, doctrinaire economists, of whatever school. It should not function unless it were as revered and trusted as the Supreme Court.

Probably the members should be appointed for overlapping terms, say from 5 to 11 years. Appointment could be by the President with the advice and approval of Congress, but with appointments so arranged that no one President could determine the economic complexion of the council.

It could be the function of this council to consider the enactments of the federal government in the light of the General

Welfare, and with specific reference to some such economic objective as that I suggested a few moments ago. If in the mature judgment of the council our national economic objectives were being endangered or violated, it would be the duty of the council to inform the government and the people of this opinion. If, nevertheless, the appropriate branch of the government took no action, and if the council saw no reason for modifying its opinion, it would be its further duty after a proper and ample interval to submit the question to the people. A referendum would then be in order, but only after the people had had opportunity to become thoroughly informed, and to study an impartial presentation of the advantages and disadvantages of the practical alternatives to the existing enactment. The result of the referendum might then serve as a guide to the national government for future policies and acts.

It will be noted that the sole power of this council would be to refer, in a proper and deliberate manner, issues of grave national importance directly to the people. This would involve selection and determination of what these paramount issues might be, and how the advantages and disadvantages of alternate choices might properly and impartially be put before the people for a matured judgment. Obviously the power should be used sparingly, and the method of its use might easily determine its wisdom.

Still another way of achieving our economic objectives might be suggested, and it should have special interest to many in this audience. Many here this evening will remember signing a petition in 1930 opposing presidential approval of the Hawley-Smoot Tariff Bill. The names of 1028 economists were registered, and the petition read like the membership roster of our leading economic societies.

Many of you have for many years recognized the futility and the inevitable disaster of a creditor nation continuing with ever higher tariffs. But in your petitions, your resolutions, your non-partisan discussions, you have thus far had no effective mechanism for truly educating the American people in terms of intelligent action. Is it possible that some other mechanism than the one I have described above at some length can be devised in order to attain our economic goal of increased balanced production with workable prices, and with due regard to the conservation of our natural resources and our demo-

cratic processes? Is it likely that publication of so significant a report as that of the Committee on Social Trends is as far as an approach of this sort can go? Or have the people in this audience something further to offer which will vitally influence the action of the American people as they grope for wise answers to such problems as that of reconciling our tariff and production policies to our creditor position? Perhaps the first task is to persuade both major political parties to declare themselves affirmatively on some mechanism which will enable the American people to make their alternative economic choices more wisely.

The approaches I have suggested this evening may be wide of the mark, but there is comfort in the reflection that our Constitution itself was the product of many minds, and in its final form differed greatly from the multitude of suggestions and devices brought to the Convention by the several delegates. Doubtless these suggestions of mine will be among many to be brought forward during the next few years. That is the characteristic American way of correcting the lag between our economic and our political institutions. Our ingenuity as a people is surely not less today than in the past. Whether our spirit and our wisdom are equal to the situation, remains to be seen. In any event, we may hope that the leaders of today will endeavor to solve our present problems by appealing continually to that spirit of unity in democracy which characterized those brilliant, far-visioned young men who wrote the Constitution. Our environment is greatly changed from theirs, but the spirit of solution should be the same. They sought political balance to protect the property rights of that day. The problem of economic balance was not then so acute. We must now use the political balance which they built to bring about the economic balance which is so essential in a society as dynamic and as complex as ours. (Applause)

REMARKS BY THE CHAIRMAN

DR. WESLEY C. MITCHELL: If one were looking for a man who represents the qualities that have given Massachusetts so high a place in American History, he might well select that native son, trained at Williams and Harvard, whose fellow-citizens have twice elected him their Governor, and who will next address us. A lawyer by profession, one who has won high standing at the bar, he must look upon constitutional problems from a viewpoint that to laymen seems technical. But Governor Ely has had long experience with the disabilities of laymen and knows how to show us the way in which the technicalities over which we may grow impatient, really affect our well-being. Also, he is endowed with a sense of humor that illumines all his discourse. I have the honor to introduce the Honorable Joseph Buell Ely, Former Governor of Massachusetts. (Applause)

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AMERICA CONSIDERS ITS CONSTITUTION

HON. JOSEPH BUELL ELY

Former Governor of Massachusetts

SINCE the adoption of the first ten amendments in 1791, the people have not found it necessary to amend the Constitution for any economic purpose, unless the Income Tax Amendment shall be so considered. The 11th Amendment adopted in 1798 construed a limitation upon the judicial power of the United States. The 12th Amendment adopted in 1804 modified the method of choosing a President and Vice President. The 13th, 14th and 15th Amendments grew out of the Civil War and the emancipation of the slave. The 16th Amendment gave to Congress the power to "lay and collect taxes on incomes, from whatever sources derived, without apportionment among the several States, and without regard to any census or enumeration". We have used that amendment to the full extent of its meaning. (Laughter) The 17th pertained to the popular election of Senators. The 18th was the Prohibition Amendment repealed by the 20th, and the 19th gave nation-wide suffrage to women. Probably a fortunate thing. (Laughter) I refuse to commit myself absolutely.

With the exception of the 16th, none of these constitutional changes gave to Congress any additional power in the making of laws designed to change the economy of the people. Such amendments as have been adopted are in the nature of perfecting amendments extending the franchise, giving further insurance to all of the equal protection of the laws and changing methods of election. The Income Tax Amendment was deemed necessary in view of adverse decisions of the Supreme Court in order to enlarge the taxing power of the federal government to meet what was then considered the necessity of a lowered tariff and the reduction of income which would be incident thereto. Giving to the Congress authority concurrent with the states to regulate a particular business, namely, the liquor business, was a part of our basic law under the 18th Amendment, for about 14 years. If there is any lesson to be

learned from turning over to the Congress and the federal government authority over business, it might be well to examine the experience with the Prohibition Amendment. (Applause) The people gave this power to Congress and then took it away. The pages of our political history do not record any demand of magnitude up to the present hour for a constitutional change which should enlarge the legislative powers of the Congress, or the right of the Congress to delegate its powers. The proposed child-labor amendment adopted by the Congress for submission to the several states some years ago has never been ratified by the requisite number, but has been defeated in the legislatures of many. This has happened although in proper form it is a proposal which appears to be in the interest of humanity.

It is undoubtedly true that the power "to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and general welfare" has been broadly construed to sustain much legislation which would pass beyond a strict interpretation of the specific powers of the Congress. This has been mostly in the line of internal improvement through subsidies to the states and the exercise of the police power. It is equally true that the commerce clause has been construed most liberally and in a way favorable to Congressional action. And yet, the line has been distinctly drawn to those who read the decisions of the Court. While businesses in the stream of commerce, like the stockyards and the wheat pit, have been regulated by the Congress with the approval of the Court, it has been stated time and time again through a long list of decisions over a long period of time that mining, manufacturing and agriculture, as local businesses, are not subject to the regulation of the Congress. In spite of the known limitation of power, the people have apparently been satisfied. No major political party has ever advocated a greater extension of power, either by constitutional change or otherwise, until now.

In the Democratic platform of 1932, I find no affirmation for a constitutional change except for the repeal of the 18th Amendment. I do find an affirmation for the extension of federal credit to the states "to provide unemployment relief and the expansion of the Federal program of necessary and useful construction affected with a public interest, such as ade-

quate flood control and waterways." The platform advocated unemployment and old-age insurance "under state laws", and "the enactment of every constitutional measure that will aid the farmers to receive for their basic commodities prices in excess of cost." That platform pledged "the removal of government from all fields of private enterprise except where necessary to develop public works and natural resources in the common interest." I find no call for a constitutional amendment in the platform of the Republican Party. (Laughter)

I find in the platform of the Socialist Party for 1932 a request for constitutional amendments authorizing the taxation of all government securities, for proportional representation, for direct election of the President and Vice President, for the initiative and referendum; an amendment to make constitutional amendments less cumbersome, for abolition of the power of the Supreme Court to pass upon the constitutionality of legislation enacted by Congress, for

the passage of the Socialist Party's proposed Workers' Rights amendment empowering Congress to establish national systems of unemployment, health and accident insurance, and old-age pensions, to abolish child labor, establish and take over enterprises in manufacture, commerce, transportation, banking, public utilities and other business and industries to be owned and operated by the government, and, generally for the social and economic welfare of the workers of the United States.

That is the only tangible recommendation of constitutional change that I have yet been able to find in any public document or discussion. It seems to me that it nearly meets the requirements if the government of the United States is to assume the function of regulating the economic destiny of business and mining, industry and agriculture.

The topic for discussion this evening is this—"America Considers its Constitution". Is it not apparent that public attention has been focused upon the basic law of this country because of the means chosen by the Administration to meet, and if possible, correct the evils which economic disorder have disclosed? The doubtful constitutionality of the N. R. A., the A. A. A., with its processing taxes, the Social Security Bill, the Wagner Labor Relations Act, the Guffey Coal Bill, the Holding Company Bill, the Bankhead Cotton Act and several other pieces of New Deal legislation, from the moment that

they were brought to general public attention have been considered of doubtful constitutionality by a great body of the legal profession of this country. (Laughter) To them the decision of the Supreme Court declaring the N. R. A. unconstitutional did not come as a surprise. It was expected. Nor will the constitutional lawyers of this country be surprised if the A. A. A., in part at least, is declared unconstitutional. (Applause) But I may venture to say that the same opinion is held in regard to many other pieces of allegedly remedial legislation.

It is unnecessary for the purposes of this discussion to treat at length the constitutional arguments which would seem to make imperative the decision of the Supreme Court in these matters. It is sufficient to say that the Congress has no authority to regulate the business of manufacturing or the business of mining. Congress would also seem to lack the authority to delegate its legislative powers to the executive, and I do not see how it can either legislate the methods of agriculture or delegate to the executive the unlimited power to control it by rule and regulation. (Applause)

If these premises are correct, and I for one fully expect them to be justified in the course of time and by the decisions of the courts, then, unless some other means within the provisions of the Constitution may be found for the enactment of New Deal legislation of similar purpose, the plan must either be abandoned, or conducted by stealth, or the Constitution must be changed.

It is not so difficult to envision the accomplishment of uniformity in laws regulating the employment of labor through state enactments and compacts, for already an arrangement has been perfected to this end by the eastern industrial states. It is easy to foresee the enactment of a proper constitutional amendment in regard to child labor.

I can see several ways of encouraging industry and capital investment. I can see a stabilized money, a stabilized government credit by means of a balanced budget, upon which all business depends. I can see relief accomplished through the extension of government credit to the several states with the tax means provided to take care of that credit.

I can see no way, however, for the federal government to exercise a control over manufacturing, mining or agriculture

to the extent which it is now endeavoring to exercise it, short of a constitutional amendment.

When we have reached the logical conclusion that much of the New Deal legislation cannot be supported under the Constitution as it now exists, we come next in the orderly process of argument to the merits of the measures themselves as they affect the economic progress of this country. If, through these measures, lies our greatest success as a nation and as a people, the Constitution should be changed accordingly. It is the solution of this question to which I should like to address my remarks.

What is the essence of this program which has revealed the Constitution for the public study? To what end does America consider her Constitution? The essence of this program lies in the two words—planned economy. I am not satisfied just to say that it is unconstitutional, great as my reverence is for that document. I further believe these policies to be unsound, both politically and economically.

Economic planning is federal control of large production, distribution, financing, labor and foreign trade. It is an attempt to govern, regulate and control business. It is the idea of regulating production to the point where it will be commensurate with expected consumption. There is a job for you! (Laughter and applause) How shall it be done? In my haphazard experience I have met few men capable of minding, successfully, more than their own business. I have met a few more successful in minding their own business. But I cannot lay hold of the name of any man capable of running everybody's business. (Applause) If there is such a single individual, it might be all right to abolish the restrictions of government during his lifetime and give him the job. We probably will never find his successor. We can give up, for a few years, our liberty, our right to think and our incentive to work. Of course, this task of a planned economy is too big a job for any one man.

In my opinion it is still further beyond successful accomplishment by any board of men. Imagine any commission of which you have knowledge, planning the agricultural and industrial production of the United States over any period of time, and doing it successfully! The minds of a majority of this commission must be brought into unison as to the amount of cotton

that shall be raised and the cloth that shall be manufactured. The board is slow, compromising, and delay is fatal. The President must be in the picture somewhere. The opinion of the board must meet his approval also, and the Congress! The cotton congressmen and the silver senators, the industrial congressmen and the mining senators, all pulling and hauling at this board of economic control to give the interests which they represent a little better break, enter into this picture of economic planning.

All regulatory commissions must either be abolished or consulted, the Interstate Commerce Commission, the Federal Trade Commission. The industrial, agricultural, financial, labor and other organizations will crowd into Washington, to the seats of the mighty, to whom is entrusted the economic destiny of 130 million people. There must be facts gathered from every corner of a far-flung country. Statistics embracing every industry and every substance will be gathered. There would be more statistics than those men entrusted with the responsibility of this business could master in a decade. Professors of economics will be there and the professors whom Franklin Roosevelt might select, in all probability will not be the professors his successor would select.

If there is any consolation in this idea of economic planning, it must rest upon an accurate and correct judgment. Not all the professors can be right. (Laughter)

This is a political country—a government of the people which chooses its representatives by popular election to run the affairs of state. The President, upon whom we confer the responsibility of naming the “three wise men” (I have assumed that it might be three), must consider, as he is obliged to consider in all cases, the political complexion of his board—perhaps a farmer, a representative of labor, a businessman; he must name these men, harassed by those of socialistic reform and meddling tendencies, to say nothing of the politicians.

The first board would probably be the best board. If by any fortuitous circumstance the men first chosen for the most stupendous task ever given into human hands, should meet with reasonable success, there would be established in this country the greatest and most powerful bureaucracy ever recorded in history. New Deal policies have already enrolled—oh what difference does it make what figure I give? A hundred and

fifty thousand bureaucrats? That is big enough. Its success would demoralize any possibility of a real democracy continuing to live in this country. To perpetuate itself, it would be necessary to exchange favors for votes. In the long reach of time, we would have a bureaucracy granting special privileges in order to perpetuate itself. (Applause) Even in the short time during which the New Deal policies of relief have been in effect we have noticed, in altogether too many instances, the placing of federal funds in lavish amounts where they would do the most good on election day. (Applause and cheering) It is a practical impossibility, no matter how high-minded the chief executive may be, to deny to the political cohorts, the disposition of the public funds in an attempt to preserve their political integrity. Those of you who are engaged in the very laudable profession of formulating theoretical rules for the improvement of economic conditions in the United States must not forget that you are looking to the politician and the self-seeking proclivities of the individual for their observance. Four years as the chief executive of a great state—one of the best states—has taught me by the route of hard experience how impossible it is to hew to the line of principle and to maintain an ideal of government. (Applause)

The board would deteriorate in its personnel as the enthusiasm for the task wanes and the natural and normal return to more prosperous conditions, planning or no planning, slackens the ardor of New Deal enthusiasm. But the bureaucracy would be there, with all its tremendous power of favor, driving the people of this country into an economic strait-jacket—a bureaucracy almost impossible to dislodge. (Applause)

This bureaucracy, like all to whom such power is given, will constantly reach out after more power. In fact, it would need dictatorial powers to do the job. The chiselers must be eliminated and the laws necessary for that purpose must be laid down and enforced. A thousand rules and regulations must be promulgated. Agents and snoopers must be employed, to see that the rules and regulations are obeyed. Every business will find the desk of the executive cluttered with the request, the demand, the order, the decree, for information regarding the detail of that business. The worker must account for his hours and report his expenditures. Initiative is stifled except in finding the means of evading the planner's decree.

Just as postmasters, collectors of revenue, marshals of the courts, have in all times been the political henchmen of the administration, so the new planners and their representatives throughout the nation, the members of this great bureaucracy will become in the ordinary course of human events, under penalty of removal, the political henchmen of the administration in power.

Anyone familiar with the possibility of dishonesty, graft and corruption in the conduct of the ordinary affairs of government, as we have viewed it and known it in the granting of licenses, the awarding of contracts for public works, the purchase of lands, and the appointments to office, must view, with the fear of absolute destruction, the granting by the people to the central government of the power over the business and agriculture of the United States, through executive order or the acts of Congress to accomplish a planned economy.

Almost always, when one speaks in opposition to the idea of making permanent this new and radical departure from the American system, he receives the retort that unless he can show a better plan he should be quiet. If I saw a man desperate with family difficulties and bankrupt financially, and the victim of rum, about to commit suicide, I would try to stop him from doing that, even though I had no remedy at hand to offer which would correct those difficulties. (Applause) Fortunately, as bad as the economic situation may seem, I can see no reason for the United States to jump into the sea of chaos which economic planning must almost of necessity bring about. We are not considering just for today. We are considering it as a permanent policy. Just as experience demonstrates that the sunshine follows the rain, and the good harvest follows the bad harvest, so the good times follow the bad times. We have taken the medicine of depression, which in and of itself cures most of the evils of a wasteful and extravagant expansion.

Now, while the natural laws of economics are bringing us out, why should man erect hurdles to retard the natural return to economic prosperity? I do not say that all the acts of the Administration are barriers to a healthy recovery—I do not say that there should have been no governmental relief. What I beg of you to consider, and after consideration to reject, is any step toward a substantially greater centralization of authority in the Congress of the United States or the chief executive

of the nation looking toward the carrying out of a planned economy in accordance with the ideas of the New Deal, as we now recognize them and understand them. (Applause)

REMARKS BY THE CHAIRMAN

DR. WESLEY C. MITCHELL: Students of comparative government have often contrasted the merits of the American scheme of political institutions with the weaknesses of the personnel to whom we entrust public business. Candidates whom we elect to office are said to be tinged with demagoguery. The permanent staff of government employees is said to be more expensive and less efficient than the civil services of European countries. All of us admit that there is a measure of justice in these strictures. But we should not forget that our government personnel includes some men who are not in politics, who get no reward of fame, who are not seeking security above all else, and who are doing responsible work with ability on a par with that of the ablest of the permanent officials who are the pride of the foreign civil services.

The influence these men exercise is often great. The value of their services, however, is likely to be known only to those who are in immediate touch with governmental work.

The final speaker on our program undertook public service during the War. He entered the Treasury Department in 1917 as advisory counsel on taxation and became Solicitor of Internal Revenue in 1918. After the War he returned to his private practice, leaving behind him a fine record of efficiency and taking with him a continuing interest in the work of the Treasury.

When the depression brought a fresh emergency, he was asked to return to the Treasury as Assistant Secretary in March 1931. About a year later he became Undersecretary, assisting Mr. Ogden L. Mills, and he remained in that capacity for the first three months of the present Administration.

If it were not that in times of special difficulty the government of this country could command the services of such men of exceptional abilities, our difficulties would be far greater than they are. The part they play in American government has not been adequately realized, much less acknowledged.

I have the honor of introducing to you a fine exemplar of this type of public servant, the Honorable Arthur A. Ballantine. (Applause)

WHY THE CONSTITUTION?

HON. ARTHUR A. BALLANTINE

Former Under Secretary of the Treasury

THERE are today many who do not believe in the Constitution. They regard it at best as a relic of a bygone age, at worst a Frankenstein monster inhibiting progress. To them, General Hugh Johnson has graphically said: "the Constitution is just a foil for clever fencing—an antediluvian joke to be respected in public like a Sacred Cow and regarded in private somewhat as Gertrude Stein probably regards the poet Tennyson." We who have an utterly different belief have an urgent call to set forth and spread our views.

To us, adherence to the Constitution and its principles rests not upon veneration or association, but upon the strongest of practical present-day reasons. We no more deny the possibility of advantageous change in the Constitution than did the forward-looking framers who provided at the outset for orderly amendment. We adherents do demand that changes which are advocated be first definitely formulated, and then discussed not merely with regard to immediate objectives, but also with regard to their effect upon the successful maintenance of the Constitution as a whole and the American plan of life.

There is an American plan for the setting of the life of the individual: this the Constitution nourishes and safeguards and therein its present value lies.

Basically, the American plan is to maintain the individual citizen in a community so ordered that the general welfare can always be protected and promoted by common action, while individual welfare remains within the scope of individual choice and direction. Individual welfare is the object: not the mystical welfare of an impersonal state or sovereign. The ruggedness of particular individuals is, however, to be softened and subdued by restraints and helps looking to the opportunity and welfare of all individuals.

Under the American plan, the business of making a living—the economic field—is left mainly to the people themselves, not taken over and managed by the state. The assumption is that the people can best manage their business affairs with the government generally acting only as the regulator: that this will provide the most abundant life, the surest security and the greatest satisfaction for the individual.

A discriminating thinker has recently described our economic system by a new term—the voluntary system. He finds the distinctive element not in competition, for that would exist in large fields under any system; not in *laissez-faire*, for that cannot exist under laws of justice; not in the use of capital, for capital would be used under any civilized system; but in the plan “under which men work together on the basis of voluntary agreement or contract rather than on the basis of coercion or authority.”

When the conduct of economic affairs is left upon the voluntary or contract basis, the state is in the position to assure to the individual the widest field of individual choice, not only in his occupation or calling and in using his economic rewards for the objects which he chooses, but also in the field of opinion, of free speech, of education and the whole range of moral and cultural life. Once the state manages economic life it has such a wide and contentious front to maintain that the entire field of individual choice must be sharply narrowed.

It has been wisely said that probably there is no man who would not prefer to live under the voluntary system, with its freedoms, if he can be equally prosperous. We can go farther and say that most of us would even sacrifice a large degree of material prosperity to maintain self-direction in our affairs and lives.

The Revolutionary War was fought for freedom from arbitrary and excessive power—in that case kingly power. The plan for their central government which the people worked out after their victory was meant to perpetuate its fruits. They wanted an abiding structure of government, not a government resting upon the sands of passing popular opinion of the moment, and they wanted that structure to conform to basic American purposes.

The basic principle implicit in the structure of the Constitution was the American idea of assuring the welfare of the in-

dividual so far as possible through his own freedom of choice and self-direction, under a government that would be orderly and helpful but not crushing or oppressive. This principle, implicit in the very structure of the original document, was written in by the adoption of the first ten amendments. These assure the familiar fundamental individual rights and expressly reserve to the people themselves for exercise through the states those intimate powers not expressly delegated to the central government.

By the constitutional framework there were turned over to the Union matters which, of necessity, had to be dealt with by unified action—powers of national defense, over foreign relations, over money, the post, over foreign and interstate commerce, and these were backed by powers to spend money for the public welfare and to raise revenue independently. In the grant of power to the Union there were made two reservations which remain of great present-day significance.

The first limitation was upon the manner of the exercise of the powers of the central government. These powers were not concentrated in any supreme authority, free to act arbitrarily according to gusts of impulse or opinion. The powers were separated into the historic tripartite division, executive, legislative and judicial. The legislative power itself was not reposed in a single chamber, impossible to constitute on an acceptable basis, but in the House of Representatives, constituted according to population, and the Senate, made up on the basis of equal representation for all states, large and small.

Of course, this division of powers did not make for maximum efficiency in governmental action. It necessitated deliberation and the observance of the constitutional plan. As Mr. Justice Brandeis has wisely said of the constitutional system: "The purpose was, not to avoid friction, but by means of the inevitable friction incident to the distribution of powers among three departments, to save the people from autocracy."

The second limitation was upon the extent to which the central government could go in the exercise of power over the daily lives of the people and matters primarily of local concern. The framers of the Constitution, deeply attached to local self-government, did not make the country into "one unbroken empire". By formulating the unique federal principle they preserved the states as repositories of power over people in their

ordinary affairs—preserved them because the states are closer to the people and more adapted to reflect in their laws inevitable differences of local conditions and sentiments. The preservation of the states and local self-government through them was and has remained the corner stone of the constitutional compact.

How was the Constitution so set up to be enforced and preserved? The framers incorporated the provision that "the Constitution and the laws made in pursuance thereof are the supreme law of the land". They vested the judicial power in the Supreme Court and in such inferior courts as Congress should constitute. The Supreme Court exercises final power of "judicial review" and declares whether a statute is or is not made pursuant to the Constitution. This practice, as firmly established as the Constitution itself, has occasioned much discussion. In all the critical comment there is no answer to the simple statement once made by Chief Justice Hughes:

It was manifestly impossible that the Supreme Court should appropriately exercise this [the judicial] power in cases arising under the Constitution without sustaining the Constitution against any legislation that conflicts with it. Instead of the exercise of this authority being a judicial usurpation, the failure to exercise it would be an unworthy abdication.

In all the world there is no higher attainment in the art of popular government than the calm exercise by the Judges of our Supreme Court of the function of preventing breaches of our fundamental law, and no comparable assurance to the preservation of the rights of the individual citizen. Federal statutes have been found unconstitutional with comparative infrequency but the existence of the review power is, however, indispensable to the vitality of the Constitution. In the recent instance of the *N. R. A.* decision our people responded to the exercise of that high power with a burst of loyalty and energy attesting its present-day value. (Applause)

As the Constitution with its guarantees is the foundation and protection of what has hitherto been the American plan of life, the question which lies at the root of present-day discussion of the Constitution is as to the value of that plan for realizing the good individual life. Can we expect to attain widespread comfort and security by sticking to that plan, or does some

different plan of life offer richer material possibilities? If we think that it does, are we willing to make the inevitable sacrifice of freedom?

Opponents of the Constitution generally proceed on the basis that the American plan has broken down; that industry, commerce and agriculture have become so complicated and so broadly interrelated that all must be operated together and operated from above instead of from within; that because of technological advance and changes of condition the Constitution is no longer adaptable to satisfactory ways of life and hence stands as a clogging relic of the horse and buggy days.

Discussion of these basic economic questions is far beyond the scope of such a paper as this: here one can do little more than indicate their relevance. Yet one may remark that such sweeping declarations sound rhetorical rather than realistic.

Contrary to the view so fervently expressed by those who weep over the Constitution, careful statistics now being widely presented back up the common-sense view that under the American plan our people have actually achieved a degree of diffusion of comfort and well-being and of opportunity never before approached at any time in any country. (Applause) Contrary to the idea that employment is permanently unequal to demand, we are now, operating with what appears to be a mere breathing spell, perhaps to be prolonged, witnessing substantial increases in business activity and employment. Contrary to the conclusion that the loss of the territorial frontier means permanent unemployment, is the conception of the limitless frontier of invention opening new vistas of economic satisfaction and of need for work.

We cannot put down the unparalleled economic achievements of our people as due primarily to our matchless natural resources—which, by the way, we still have. In no less part, perhaps in greater part, it was due to the operation of human energies realized and given scope by the constitutional plan. The adoption of a coercive economic scheme which regiments and deadens those energies, and which inevitably freezes the present state of economic development, involves sacrifice of mainsprings of production upon which abundance and security depend. Most of us still have faith in the fundamental economic efficiency of the American plan.

In the belief that the American plan no longer has vitality, amendments have been introduced, which would make way for its complete elimination. Such is the Keller Amendment, introduced last June, which reads: "The Congress shall have power to pass all laws which in its judgment shall be necessary to provide for the general welfare of the people." An amendment of this character would open the way for setting up in America an economic state taking over and ordaining all the daily activities of our people from Washington with an army of bureaucrats.

Such developments are precisely what have occurred abroad where there was no constitutional protection—always under the plea of the good of the people. Open advocacy of the totalitarian state—dictatorship—for us will, I think, meet with as much resistance, once our people are aroused, as did King George III's much lesser assaults upon our liberties. We are not ready and never shall be ready in the United States of America for the ways of Stalin, Hitler or Mussolini. (Applause) We are far from so despairing of our future as to amend the Constitution in such manner that all that stands between us and dictatorship is an act of Congress.

I judge that Secretary Wallace has no notion of any amendment of this character or any amendment which would change the fundamental constitutional scheme. He has in his writings referred frequently to the analogy of the traffic rules and the obeying of traffic rules by good citizens. We all try to do that. I have wondered sometimes, as I read some of his writings, as to whether he favored having the traffic police not merely assist our traveling but choose our destinations for us. That is something quite different.

Amendments which would take from the Supreme Court, in greater or less degree, power to uphold the supremacy of the Constitution over laws found to be unauthorized or conflicting, are also in essence directed to the destruction of the Constitution. Both Congress and the people should in their every act support the Constitution, but, when they are faced with a deeply felt immediate issue, desire for the objective is likely to ruin any effort by them at sincere interpretation of the Constitution. That is inherently a matter for a court. The final power over that must necessarily be judicial.

When it is urged that the existence of this power and of the Constitution may prevent the people from attaining any desired objective, we must remember that declaring a statute unconstitutional cannot do more than defeat the measure for the time needed for the adoption of a constitutional amendment. Careful deliberation before adopting fundamental changes is not too much to expect and may be richly rewarded. And, as was shown in the case of the last amendment, which put an end to national prohibition, this power can be quickly exercised when our people are in substantial agreement.

It is urged, however, that the process of amendment should be made easier. In an article published last January Secretary Wallace suggested that a very small economic council be set up by presidential appointment, with power to propose amendments on key questions of national policy, such amendments to become part of the Constitution by vote of two thirds of the people. As Secretary Wallace has very candidly said, he has been turning that idea over and apparently he has modified his views to some extent. Of course, that plan as proposed had the difficulties in it of substituting the executive for Congress or state legislatures in proposing amendments, and absolutely ignoring state lines or the voice of the states in adopting amendments. That, as a plan of amending the Constitution, would be a long step away from the basis of the compact. As I understand his present suggestion, it is that the council be more advisory and the referenda informative. Well, that doesn't fall within the scope of constitutional discussion and, if the council is meant to operate economically, I leave that subject in the tender care of Governor Ely.

A believer in the basic American plan of living must resist amendments which are destructive of the Constitution and its principles, but he is open-minded and receptive to amendments which are not destructive and further the welfare of our people. Even the most zealous believer in the American plan of life as our basic scheme is far from contending that that plan or its operation has been perfect. We have not succeeded in abolishing poverty. We have not solved the problem of human security. We have by no means attained perfect justice or equality of opportunity. The social structure is still in the making. There is no party monopoly on ameliorative change. Except for those who actually wish to destroy the American

plan, real differences are as to the method and the practical effect of measures, not as to the desirability of improvement and progress for our people.

When, conscious of the shortcomings of our system, we seek to eliminate an evil or secure a good, there are certain questions which we adherents to the Constitution must put. The first question is what can be done through exercise of powers already conferred. Clearly constitutional powers are far from exhausted. Take the most vital emergency matter of all—human relief. The spending powers of the government have certainly been ample for that objective. So of public works. But for many new measures, and of others of doubtful constitutionality, it may be demonstrated that greater patience would find a constitutional path to the desired objective.

The failure of the N. R. A. has led to the plea that we are remitted in business relations to cut-throat competition: again, the law of the jungle. Yet the constitutional possibilities of providing for constructive regulation of abuses in industry, while retaining its essentially voluntary character, are by no means exhausted. This was notably shown by the decision of the Supreme Court some two years ago refusing to enjoin activities of an association of coal operators seeking to promote competition on an economically sound basis instead of on a destructive basis. Developments along the line of the Federal Trade Commission, as of the Securities Commission, and the far older Interstate Commerce Commission, hold large possibilities.

When it is urged that constitutional powers are not sufficient for the accomplishment of a desired change, the issue is presented as to exactly what additional powers would be granted to the national government or its officers, and how this grant would affect the whole constitutional structure. Amendments to be made the subject of intelligent discussion must be concrete and lined up in relation to the constitutional plan as a whole.

The question of particular amendments may well be illustrated by questions arising since the recent decision of the Supreme Court on the National Recovery Act. One of the main points there decided was that the executive officers of the government could not in their own discretion ordain codes to have the force of law in industry. In response to that holding there was introduced into the House of Representatives a

Joint Resolution which, among other things, provides: "The Congress shall have power to delegate its legislative power to the President and/or to such agencies as he may select." Openly to impose legislative power in the President himself, let alone his nominees, would be a startling change. Senator Borah has well said:

The court did say, however, and in so saying held—it seems to me to the full limit—that if Congress would provide in the law a standard, a guide or a rule governing the Executive in making rules and regulations which would have the force of law, that such rules and regulations thus made would be valid.

Do we want more? Do we want to provide for government by executive decree?

A second question arising more insistently out of the recent decision is whether Congress should be given power, at least in certain fields, to ignore state lines and regulate economic affairs that are primarily intrastate. On that point the decision in the *N. R. A.* case, as in prior cases, was that federal regulation could not extend beyond interstate commerce and activities directly affecting interstate commerce. In connection with federal legislation regulating labor and industry we face the question of whether this is today an adequate formula for the scope of federal power. Some reasons may be pointed out why the old formula still has merit.

Can Congress wisely prescribe uniform conditions and restrictions for labor or industry applying through the whole area of the United States, from Maine to California? Secretary Wallace has written very strongly about sectional log-rolling in connection with the tariff. In the field of federal action on labor and industry log-rolling would take on unheard-of proportions.

No one has put better than Secretary Wallace this basic difficulty as to such legislation. In his latest book, he says:

The alarming thing in Washington is not that there are so many special pressure groups but that there are so few people who are concerned solely with looking at the picture from the broad, national angle. Most Congressmen and Senators, it seems, are of necessity special pleaders for a particular region. It is, therefore, up to the executive branch of the Government to consider the national interest. This is difficult at times because many officials in the executive branch owe their positions to representations made by particular Congressmen or Senators at the behest of special groups.

Assuming that Congress does legislate wisely for the internal affairs of states, would the people of the states endure it? No one stated grounds for a contrary belief more forcibly than did President Roosevelt while Governor of New York. Such laws could be enforced only by an army of investigators and prosecutors from Washington. Their number would be legion and their name anathema. The N. R. A., before invalidation by the Court decision, was already breaking down, largely because it was diverted from a voluntary effort into Washington control. Would not the states treat the attempt by Washington to regulate their economic affairs as they did the attempt to regulate their personal habits?

There is an even more important consideration bearing upon the expansion of federal power over state affairs. If that is attempted, it is unlikely that the larger states will rest satisfied with the compromise confining representation in the Senate to the same number for the larger state as for the small. On the other hand, it is hardly conceivable that the small states would give up their historic representation. By pushing the federal power too far, the risk is incurred, not only of failure in the exercise of the power but of breaking up the constitutional framework itself.

A means of securing wider territorial units for dealing with the regulation of business is indicated in the constitutional provision for interstate compacts. These may be validated by the approval of Congress and have been usefully applied to the handling of certain natural resources extending beyond the boundaries of single states. Wider application of the regional plan may hold desirable possibilities.

The main question underlying constitutional discussion of the day is whether our people wish to adhere to the general American plan of life. Most of us believe that in spite of all changes in economic conditions, principles have not changed, and there is today no better chart than that of keeping to individual self-direction and self-dependence, to self-government and to government which regulates but does not coerce its citizens in their own affairs. We believe that it is still in the direction of freedom that we shall find the greatest progress, abundance and security, as well as the greatest moral satisfactions.

Let us stick to the Constitution and its principles, because of the daily return they bring to us, and give thanks that they are there to guard against any turning from the American plan without conscious determination to abandon it! While the Constitution stands no alien plan can steal upon us like a thief in the night.

Let us stand against thrusting invidious and undue burdens upon the Supreme Court by the passage of laws thought in advance to be unconstitutional! That is to repudiate responsibility and to trifle with the protectors of justice.

Let us be loyally open to ameliorative amendment but firm against destructive amendment! Let us constructively uphold the Constitution and its principles, strong in the belief that "if wisely conserved and improved it is capable of transmitting to the latest posterity all the substantial blessings of life and peaceful enjoyment of liberty, property, religion and independence!" (Applause)

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Let us first see the Constitution and its principles, and then the whole extent of the power of the State in the United States. The Constitution is a document which is the basis of the government of the United States. It is the supreme law of the land, and it is the duty of every citizen to know it and to obey it. The Constitution is divided into three parts: the Preamble, the Articles, and the Amendments. The Preamble states the purpose of the Constitution, which is to form a more perfect Union, to establish Justice, to insure domestic Tranquility, to provide for the common defence, to promote the general Welfare, and to secure the Blessings of Liberty to ourselves and our Posterity. The Articles describe the structure of the government, and the Amendments describe the changes that have been made to the Constitution since it was first adopted.

ARTICLE I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors in that State. No Representative shall, when elected, be less than twenty five Years of Age, seven Years a Citizen of the United States, and when elected shall have been seven Years a Citizen of that State. Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature of the State for six Years; but they shall not be more than thirty five Years of Age at the Time of their Election, and they shall not be less than thirty Years of Age at the Time of their Admission to Office. Section 4. The Senators and Representatives shall receive Compensation for their Services, which shall be ascertained by a Law. Section 5. The Senate shall have the sole Power to try all Cases of Impeachment. Section 6. The Senators and Representatives shall be privileged in all Speeches and Debates in Congress, not to be questioned in any Court or Place. Section 7. The House of Representatives shall have the sole Power of Impeachment. Section 8. The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and to provide for the common Defence and general Welfare of the United States; but all Taxes on Imports and Exports shall be uniform throughout the United States. Section 9. The Congress shall have Power to regulate Commerce with foreign Nations, to regulate Commerce among the several States, and to regulate Commerce with the Indian Tribes. Section 10. No State shall enter into any Treaty, Alliance, or Confederation with a foreign Nation, or State, or enter into any Agreement or Compact with a foreign Nation, or State, or enter into any Agreement or Compact with a foreign Nation, or State, or enter into any Agreement or Compact with a foreign Nation, or State.

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